92-1062

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

I.T.O. CORPORATION OF BALTIMORE,

Petitioner,

vs.

WILLIAM SELLMAN, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Can the Fourth Circuit and Benefits Review Board ignore this Court's clear holding in Cowart v. Nicklos Drilling Co., ___ U.S.___, 112 S.Ct. 2589 (1992), that the language of Section 33(g) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §933(g), is plain, unambiguous and unforgiving, and create a judicial exception to the Congressionally mandated requirements of Section 33(g), when a claimant undisputedly settles a third-party case without complying with the specific mandatory requirements of the statute?

II. As a matter of first impression, under Section 33(f) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 933(f), can previously negotiated and executed settlement agreements be permitted to be administratively rewritten

after-the-fact to apportion settlement monies to a spouse for loss of consortium, thereby depriving employers of their statutory right to offset the net proceeds received by a claimant from a third-party settlement?

III. Did the Fourth Circuit violate the Due Process Clause of the Fifth Amendment to the United States Constitution, Federal Appellate Rule 40, and its own Internal Operating Procedures, by accepting for filing an untimely Petition for Rehearing from the Director, OWCP, and then ex parte reversing its initial decision in favor of the Petitioner on the Section 33(f) issue, without giving the Petitioner an opportunity to be heard in response to the timeliness of the Petition for Rehearing and the new arguments made by the Director therein?

LIST OF PARTIES

A. The following are entities interested in the outcome of this case:

The parties to the proceedings below were the petitioner I.T.O. Corporation of Baltimore, and the respondent William Sellman (by his wife and legal guardian, Rhoda Sellman). The Director, Office of Workers' Compensation Programs, United States Department of Labor was a separate party-in-interest and appellee in the court below.

Petitioner, I.T.O. Corporation of Baltimore, has no parent or subsidiary corporations. Home Insurance Company, excess insurance carrier, has a financial interest in the outcome of this litigation.

B. The following are names of opposing law firms and/or counsel in this case:

Petitioner's counsel of record is Rudolph L. Rose, Esquire, Semmes, Bowen &

Semmes, 250 West Pratt Street, Baltimore, Maryland 21201. Petitioner's attorneys are Stan M. Haynes, Esquire, and John D. Kromkowski, Esquire, of Semmes, Bowen & Semmes, 250 West Pratt Street, Baltimore, Maryland 21201.

Counsel for Respondent, William Sellman, are Paul D. Bekman, Esquire, Israelson, Salsbury, Clements and Bekman, 300 West Pratt Street, Baltimore, Maryland 21201, and Roger Smith, Esquire, 425 North Crain Highway, Glen Burnie, Maryland 21061.

Counsel for Respondent, Director, OWCP, are Marshall J. Breger, Solicitor of Labor; Carol A. De Deo, Associate Solicitor; and Joshua T. Gillelan II, Attorney, U. S. Department of Labor, Office of the Solicitor, Frances Perkins Building, Suite N-4631, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

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The Decision and Order of Administrative Law Judge G. Marvin Bober in this case was rendered on June 29, 1987, and is published at 20 BRBS 530 (1987). (Appendix A).

The opinion of the Benefits Review Board was rendered on July 31, 1990, and is published at 24 BRBS 11 (1990). (Appendix B).

The United States Court of Appeals for the Fourth Circuit rendered its initial decision on January 22, 1992, affirming the decision of the Benefits Review Board as to the effect of the Section 33(g), but reversing the Board as to the effect of the Section 33(f) offset provisions. 954 F.2d 239 (1992). (Appendix C).

On February 18, 1992, the Respondent Director, OWCP, filed a Petition for Rehearing and Suggestion of Rehearing En

Banc regarding the Section 33(f) issue. By Order dated February 27, 1992, the Fourth Circuit denied the Petitioner's request for an opportunity to respond to the Director's Petition for Rehearing. (Appendix D.)

On June 17, 1992, the Fourth Circuit, without requesting or permitting any response from Petitioner, issued a supplemental opinion, which vacated its reversal of the Benefits Review Board decision as to Section 33(f). 967 F.2d 971 (4th Cir. 1992). (Appendix E).

On September 22, 1992, the Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc was denied. (Appendix F).

STATEMENT OF JURISDICTION

The Fourth Circuit Court of Appeals entered its judgment on January 22, 1992, and modified its judgment on June 17, 1992. Thereafter, the Fourth Circuit denied

Petitioner's Request for a Rehearing En Banc on September 22, 1992.

This Petition for Writ of Certiorari was filed within 90 days of September 22, 1992, as required by 28 U.S C. Section 2101(c) and Supreme Court Rules 13.1 and 13.4. Jurisdiction is proper under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Section 33(g) of the Longshore and Harbor Workers' Compensation Act, which reads in pertinent part:

> (g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form

> provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

33 U.S.C. §933(g).

Section 933(f) of the Longshore and Harbor Workers' Act provides:

> If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C. §933(f).

STATEMENT OF THE CASE

This case arises out of a workers' compensation claim brought under the federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901, et seq. It has already been the subject of this Court's attention in the recent decision in Cowart v. Nicklos Drilling Co., ___ U.S. ____, 112 S.Ct. 2589 (1992). In fact, the Fourth Circuit's erroneous decision with respect to Section 33(g) figured prominently in Cowart's unsuccessful argument to the Court. See (Appendix H, Transcript of March 25, 1992, Proceedings at 4-7, Appendix H. at p. 5-8); see also Cowart, 112 S.Ct. at 2598.

In the instant case, the Claimant was injured on July 10, 1979, while working as a longshoreman aboard a ship, the Algenib. In addition to filing the subject workers'

compensation claim under the Longshore Act, the Claimant and his family also filed a third-party lawsuit in 1982 against various parties, including the owners of the Algenib. The Employer was a use plaintiff in the Claimant's third-party lawsuit.

On June 12, 1984, the terms of settlement of the third-party lawsuit were finalized through two separate settlement agreements. The settlement agreements were executed on June 18, 1984. Under one agreement, I.T.O. received $250,000.00, which was partial reimbursement of its outstanding compensation lien at the time of the settlement. Under the other agreement, the Claimant and his family received $250,000.00 in settlement of their claims against the third-party Defendants. There is no language in either settlement agreement providing that the Employer waived its statutory right to offset future

compensation benefits, under Section 33(f) of the Longshore Act, against the amount received by the Claimant in his third-party settlement. Accordingly, on July 21, 1984, the Employer suspended compensation payments to the Claimant, and the suspension was to continue until the net amount that the Claimant received from the third-party settlement was offset.

During the course of and following the third-party settlement, the Claimant failed to prepare the mandatory LS-33 form required under Section 33(g), failed to have it executed by the Employer and failed to have it filed with the Deputy Commissioner. In fact, no such form was ever sent to the Employer. As such, the Employer contends that it has the statutory right under Section 33(g) of the Longshore Act to terminate <u>all</u> benefits to the

Claimant, in addition to any offset permitted under Section 33(f).

The Claimant and his family initiated the subject proceeding, wherein they allege that the Employer is not entitled to its statutory right to offset benefits against the money received by the Claimant in his third-party settlement and that the Employer is not entitled to terminate all benefits under Section 33(g). In the initial decision below, Appendix A, Administrative Law Judge G. Marvin Bober (hereinafter referred to as the "ALJ" or the "Judge") erroneously accepted both of the Claimant's arguments. He ignored the Claimant's failure to comply with the specific mandatory requirements of Section 33(g) and held that the Employer was not entitled to terminate all further compensation benefits to the Claimant. In so ruling, the ALJ, by his own admission,

adopted a "less restrictive approach" to Section 33(g) -- an approach that is in violation of the clear Congressional intent and which represents a loose interpretation of Section 33(g) of the type that was specifically rejected by the this Court's decision issued in Cowart on June 22, 1992. See Appendix A.

The Employer appealed the decision of the ALJ on both the Section 33(g) and Section 33(f) issues to the Benefits Review Board. The three-member panel of the Board unanimously affirmed the ALJ's decision on the Section 33(g) issue. See Appendix B. In a sweeping judicial rewriting of the Longshore Act, since overruled by this Court in Cowart, the Board held, for the first time, that Section 33(g)(1) does not apply whenever an employer is involved in a third-party settlement. The Board also held, in contrast to its own earlier

holdings, that what were once thought to be mandatory requirements of Section 33(g) were no longer necessary and mere "constructive approval" of a third-party settlement would, from now on, be sufficient under Section 33(g)(1). See Appendix B.

The Employer filed an appeal to the Court of Appeals for the Fourth Circuit from the decision of the Benefits Review Board, seeking to have the court hold that (1) the Employer is entitled to terminate all compensation and medical benefits to the Claimant based upon the Claimant's failure to comply with the mandatory requirements of Section 33(g) and, alternatively, (2) that the Employer is entitled to offset the Claimant's compensation and medical benefits under Section 33(f) in the net amount that the

Claimant received in the third-party settlement.

On January 22, 1992, the Fourth Circuit issued its decision affirming the Benefits Review Board's decision regarding Section 33(g), and reversing the Board's decision as to Section 33(f)'s offset provisions. Notably, the Fourth Circuit failed to take any account of the Fifth Circuit holdings which this Court ultimately upheld in Cowart. See I.T.O. Corporation v. Sellman, 954 F.2d 239 (4th Cir. 1992), Appendix C.

On February 18, 1992, the Respondent, Director, OWCP, filed a Petition for Rehearing and Suggestion of Rehearing En Banc concerning the Section 33(f) offset issue, which had been decided in favor of the Employer. This Petition for Rehearing was not filed within fourteen (14) days, as required by Federal Appellate Rule 40 and by Fourth Circuit I.O.P. Rule 40.2, which

states that no petition for rehearing will be accepted after the fourteen day deadline. The Petitioner wrote to the court on February 26, 1992, and asked for an opportunity to respond to the new arguments raised in the Director's Petition for Rehearing. Appendix I. This request was denied by the Fourth Circuit, without explanation, in an Order dated February 27, 1992. See Appendix D.

On June 17, 1992, the Fourth Circuit, without requesting or permitting any response from the Petitioner, issued a supplemental opinion, vacating its reversal of the Benefits Review Board's decision as to Section 33(f), based upon a non-binding, distinguishable and intervening decision of the Ninth Circuit in Force v. Director, OWCP, 938 F.2d 981 (9th Cir. 1991). See I.T.O. Corporation v. Sellman, 967 F.2d 921 (4th Cir. 1992), Appendix E.

Five days after the Fourth Circuit's second decision, this Court issued a leading opinion on the interpretation of Section 33(g) in Cowart v. Nicklos Drilling Co., ___ U.S. ___, 112 S.Ct. 2589 (1992). This Court, by a six to three majority, held that the language of Section 33(g) is plain and clear and, notwithstanding prior notice of the third-party settlement by an employer (in Cowart, the employer had actually funded the settlement), an employee is barred from all further compensation where "he did not secure from [the Employer] a formal, prior, written approval of the . . . settlement." Cowart, 112 S.Ct. at 2592.

In light of this Court's clear decision in Cowart, the Petitioner filed a Motion for Rehearing in the Fourth Circuit. On September 22, 1992, the Fourth Circuit

denied the Petitioner's Motion for Rehearing. See Appendix F.

REASONS FOR ISSUING A WRIT OF CERTIORARI

The Petitioner submits that there are special and important reasons for granting certiorari on the issues presented in this case. Sections 33(g) and 33(f) of the Longshore and Harbor Workers' Act affect thousands of pending cases across the country. The importance of Section 33(g) alone is evidenced by this Court's issuance of a Writ of Certiorari in Cowart v. Nicklos, ____ U.S. ____, 112 S.Ct. 2589 (1992).

The Fourth Circuit's failure to strictly interpret the clear language of Section 33(g) is in direct conflict with this Court's recent decision in Cowart. Sup. Ct. Rule 10.1(c). The lower court's erroneous narrow interpretation of the forfeiture provisions of Section 33(g) is an impermissible judicially-created exception to the same statutory section

that this Court held in Cowart to be clear, unambiguous, subject to no exceptions and at times harsh in its results. 112 S.Ct. at 259. See also S.Ct. Rule 10.1(a).

The Fourth Circuit's opinion violates the Legislature's clear mandate in its drafting of the language of Section 33(g), violates the Executive's argument, through the Solicitor, to this Court in Cowart that Section 33(g) means what it says and is subject to no exceptions, and violates the will of the Judiciary, as expressed by this Court in its ruling in Cowart. Granting a Writ of Certiorari is essential in light of the violation by the decision below of the unanimous opinion of the three branches of our government.

In addition to the erroneous Section 33(g) interpretation below, the Section 33(f) issue involved herein is an important federal question of first impression. See

Sup.Ct. Rule 10.1(c). The Fourth Circuit, in reversing its own prior decision, has judicially created a burden of proof scheme not contemplated by Congress. See I.T.O. Corp. v. Sellman, 967 F.2d 971 (4th Cir. 1992), Appendix E. Although the statute contains no such provision, the decision below requires employers and insurers to prove how proceeds from a third-party settlement are to be distributed, above and beyond the clear language of previously executed settlement agreements. As such, the Fourth Circuit has adopted an approach which contradicts fundamental principles of contract law and which will now require thousands of cases to be retried before administrative law judges. Moreover, the retroactive application of the ill-conceived rule adopted below will create an additional burden upon employers and insurers, who were not aware that they

would be required to marshal any evidence other than the actual agreements of settlement which they approved and executed in accordance with the prevailing judicial interpretation.

A Writ of Certiorari is important because the combination of erroneous and ill-conceived rulings below regarding Sections 33(g) and 33(f) undermines the foundation of the legislatively enacted balance between employees and employers. The Fourth Circuit's judicial revision of the Longshore and Harbor Workers' Compensation Act not only threatens the underpinnings of that Act, but also infringes on the constitutionally enshrined principles of separation of powers, which places the writing of legislation in the hands of Congress, not the Courts. Accordingly, a Writ of Certiorari should be issued.

Finally, a writ of certiorari should be granted to correct the violation of fundamental rules of procedure and fairness below. The Fourth Circuit's course of conduct in allowing an untimely filed Petition for Rehearing by the Director, in violation of that court's own rules, and by proceeding ex parte to alter its opinion regarding Section 33(f) without providing the Petitioner an opportunity to be heard, requires an exercise of the Court's power of supervision. Sup. Ct. Rule 10.1(a). The "back-door" ex parte reversal of a key issue initially decided in favor of the Petitioner should not be permitted to stand.

ARGUMENT

I. THE CLAIMANT'S UNDISPUTED FAILURE TO SECURE EMPLOYER'S FORMAL, PRIOR AND WRITTEN APPROVAL OF A THIRD PARTY SETTLEMENT PRECLUDES ALL FUTURE COMPENSATION BENEFITS UNDER THE CLEAR AND UNAMBIGUOUS FORFEITURE PROVISION OF SECTION 33(g) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

A. The Fourth Circuit Decision is in Direct Conflict with the Decision of this Court in Cowart v. Nicklos Drilling Co. and Improperly Creates a Judicial Exception to the Otherwise Clear and Unambiguous Language of Section 33(g) of the Longshore And Harbor Workers' Compensation Act.

In the Fourth Circuit's decision of January 22, 1992, Appendix C, the Court of Appeals erroneously held that the mandatory written approval requirements of Section 33(g) of the Longshore Act, 33 U.S.C. §933(g), were not applicable. The basis for this holding was the Fourth Circuit's conclusion that the participation of the Employer in the third-party settlement

process obviated the mandatory statutory language. I.T.O. Corporation of Baltimore v. Sellman, 954 F.2d 239, 242-43 (4th Cir. 1992), Appendix E at 15-16.

Subsequently, the Court spoke directly to the issue of the scope of Section 33(g) in Cowart v. Nicklos Drilling Co., ___ U.S. ___, 112 S.Ct. 2589 (1992). In Cowart, the Fifth Circuit applied Section 33(g) to bar all future compensation to a claimant who had settled a third-party case without obtaining the mandatory written approval required by Section 33(g), despite the fact that the employer in Cowart had prior notice of the third-party settlement and, in fact, funded the entire settlement under an indemnification agreement with the third-party defendant. Cowart, 112 S.Ct. at 2592-2594. In affirming the Fifth Circuit's application of Section 33(g) to bar future benefits, this Court noted "the

basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." Id., at 2594. This Court recognized and enforced the harshness of Section 33(g):

> We do recognize the stark and troubling possibility that significant numbers of injured workers or their families may be stripped of their LHWCA benefits by this statute, and that its forfeiture penalty creates a trap for the unwary . . . But Congress has spoken with great clarity to the precise question raised by this case. It is the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness.

Id., at 2598 (emphasis added).

Of significance to this Court in Cowart was the fact that the Director, OWCP changed his position on the strict interpretation of Section 33(g) between the time that Cowart was before the Fifth Circuit and the time it was before the Supreme Court. This Court noted that:

> [T]he Director of the OWCP and the Department of Labor have altered their position regarding the best interpretation of §33(g). The Director appears as a respondent before us, arguing in favor of the Court of Appeals' statutory interpretation, and contrary to his previous position . . .. Instead, the federal respondent argues that the Court of Appeals was correct in saying the language of §33(g) is plain and cannot support the interpretation given it by the Board.

Id., at 2594-5 (emphasis added).

In the present case, the Director, OWCP, has appeared before the Fourth Circuit, as he did before the Fifth Circuit, as perhaps the primary advocate for the adoption of a less restrictive interpretation of Section 33(g). The Fourth Circuit accepted this view in the decision of January 22, 1992, accepting the same type of loose interpretation of Section 33(g) that the Director, OWCP had urged upon the Fifth Circuit in Cowart, but which the Director changed when the case

reached the Supreme Court. See Sellman, 954 F.2d at 242, Appendix C at 14-15. In Cowart, this Court noted its displeasure with "the inconsistent course followed over the years by the federal agencies charged with enforcing the Act." Id, at 2598. In effect, with the additional Supreme Court proceedings in Cowart since the Fourth Circuit's initial decision of January 22, 1992, the Petitioner submits that Director, has taken inconsistent positions on the mandatory scope and effect of Section 33(g). One phrase of Section 33(g) cannot be construed strictly while other clauses are permitted to be construed loosely.

The Supreme Court has held that the scope of Section 33(g) is broad and that the language must be applied literally and strictly followed. With reference to the issue involved herein, Section 33(g) is clear:

> "If the person entitled to compensation . . . enters into a settlement with a third person . . . the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the persons's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

§33 U.S.C. §933(g)(1) (emphasis added). In the present case, none of the mandatory requirements of Section 33(g)(1) were met and this Court cannot excuse these mistakes, without overruling its recently issued opinion in Cowart.

B. Prior Case Law from the Benefits Review Board Correctly Interpreted the Legislative History of Section 33(g) Until the Board Succumbed to the Ever-Changing Interpretive Dance of the Director.

The incorrect interpretation of Section 33(g) that has been adopted by the Fourth Circuit and the BRB below represents a dramatic departure from prior decisions enforcing the mandatory language of Section 33(g) is the written approval and filing requirements. A recent move toward loose interpretation has been spearheaded, until Cowart, by what has become an ever-changing "interpretive dance" of the Director, OWCP.

In Devine v. National Creative Growth, Inc., 16 BRBS 147 (1982), the BRB held that an employer was not liable for any additional compensation benefits following a third-party settlement because the claimant failed to follow the "clear and precise statutory scheme" required by

Section 33(g).[1] 16 BRBS at 153. In Devine, the Board held

> Explicit approval by the employer on the designated form is therefore required when claimant enters into a third party settlement. Moreover, the required written approval must be filed with the deputy commissioner ... In the instant case, the evidence establishes that no written approval of the third party settlement was ever obtained on the form provided by the Secretary; it is clear that this form was never filed in the office of the deputy commissioner . . . Employer/carrier is, therefore, not liable for further compensation benefits.

16 BRBS at 153 (emphasis added).

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[1] At the time Devine was decided in 1982, Section 33(g) contained no subsections. The language interpreted in Devine is essentially the same language that now comprises Section 33(g)(1). In the 1984 amendments to the Longshore Act, the language of Section 33(g)(2) was added. The Board has repeatedly held that the 1984 Amendments did nothing to change the meaning of the words used by Congress in what now comprises Section 33(g)(1). See e.g., Nesmith v. Farrell American Station, 19 BRBS 176, 178 (1986). The 1984 Amendments have been held to apply retroactively to any claim pending as of September 28, 1984, and, thus, are applicable in the present case. See, Dorsey v. Cooper Stevedoring Co., 18 BRBS 25 (1986), appeal dismissed, 826 F.2d 1011 (11th Cir. 1987).

The Board specifically noted the legislative history to the 1972 amendments to the LHWCA and held that it "clearly manifested" the "intent and purpose" of the Congress:

> WRITTEN APPROVAL OF COMPROMISE SETTLEMENTS
>
> S.2318 amends Section [33(g)] to make clear what Congress intended by requiring "written approval" of the employer of compromise settlements in third-party cases in order to avoid discharging the employer from further liability under this Act. Some courts have held that employers or insurance carriers are estopped to deny they have given their written approval when in fact no such written approval was given. This amendment makes it clear precisely what written approval the person entitled to benefits must obtain and file with the deputy commissioner to constitute the written approval contemplated by this subsection of the Act.

S. Rep. No. 1125, 92d Cong., 2d Sess. 14 (1972) (emphasis added), reprinted in Subcomm. on Labor of the Sen. Comm. on Labor and Pub. Welfare, 92d Cong., 2d Sess., Legislative History of the

Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, at 76 (1972), quoted in Devine, 16 BRBS at 152.

Given the language of the statute and the legislative history, the Board held in Devine that Section 33(g) "was intended to precisely define the type of written approval that was required." Id. at 152. The Board rejected as having "no merit" the Fourth Circuit's current position that Section 33(g) is not applicable in cases where the claimant, the third-party and the compensation carrier all sign the third-party settlement agreement. Id. at 152, fn. 6.

Four years after Devine, the Board was again faced with interpreting Section 33(g) in Dorsey v. Cooper Stevedoring Co., 18 BRBS 25 (1986), appeal dismissed, 826 F.2d 1011 (11th Cir. 1987). In Dorsey, the Board had its first opportunity to

interpret the 1984 amendments to Section 33(g), which, as noted above, essentially left unchanged the language of what is now Section 33(g)(1) and added the language of Section 33(g)(2). The Board in Dorsey followed the clear language and legislative intent of Section 33(g)(1), as was done in Devine.

The Board rejected an ALJ's finding that the employer had waived its rights under Section 33(g) by intervening in the third-party lawsuit and accepting proceeds from the third-party settlement. The Board held in Dorsey that such arguments must be rejected, since they "would be contrary to Congress' purpose in amending Section 33(g) in 1972 to reject applications of estoppel and similar theories to this section . . . the 1984 Amendments indicate no intention to abandon this purpose. The statute expressly requires written approval under

33(g)(1) . . . and provides no waiver by acceptance or knowledge" by the employer of the third-party settlement. 18 BRBS at 31-2 (emphasis added).

Similarly, in Nesmith v. Farrell American Station, 19 BRBS 176 (1986), the Board affirmed an ALJ's termination of all future benefits to a widow, based upon the failure to comply with Section 33(g). The widow in Nesmith argued that the ALJ should have considered "equitable principles and the beneficent purpose of the Act" and avoided the mandatory penalty of Section 33(g). Id. at 179. The Board concluded that such factors should not be considered when applying Section 33(g), since "[t]he legislative history of Section 33(g) indicates that [the section was] . . . intended to overrule case law applying estoppel, substantial compliance and similar theories to avoid the effect of

non-compliance with Section 33(g) . . .." Id. The Board further noted in Nesmith that the preservation of this strict language in the 1984 Amendments to the Longshore Act confirmed "Congress' clear intent to prevent claimant from relying upon these equitable principles to avoid strict compliance . . .." Id.

Despite these well-founded holdings, the BRB, in the mid-1980s, succumbed to the interpretive dance of the Director, whose arguments had previously been flatly rejected, and began to judicially engraft exception after exception to what had previously been held to be Congressionally mandated requirements. See e.g., Collier v. Petroleum Helicopters, Inc., 17 BRBS 80 (1985)(BRB erroneously held that Section 33(g) does not apply in situations where the employer has contractually waived its right to subrogation against the third-

party defendant); Pinell v. Patterson Service, 22 BRBS 61 (1989)(BRB, without reference to prior decisions, erroneously held that employer's participation in the third-party settlement negotiations, "provided constructive approval of third-party settlement"); Cowart v. Nicklos Drilling Co., 23 BRBS 42 (1989)(In an attempt to avoid Fifth Circuit's prior strict interpretation, BRB erroneously held that requirements of Section 33(g)(1) do not apply when the claimant is not actually receiving compensation payments at the time of the third-party settlement). The Fifth Circuit, however, has resisted the BRB's move toward a loose interpretation of Section 33(g) at every opportunity.

C. The BRB's and Fourth Circuit's Statutory Construction in this Case is in Direct Conflict with the Fifth Circuit's interpretation of Section 33(g)

In Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644 (5th Cir. 1986), the Fifth Circuit used language reminiscent of the Board's own language in Devine, Dorsey, and Nesmith. The court clearly held that Section 33(g) says what it says and there are no exceptions, even when the employer has waived its subrogation rights in the third-party case. The Fifth Circuit held in Collier that subsections 1 and 2 of Section 33(g) are "brutally direct" and "frame an unmistakable scheme" that must be followed whenever a third-party case is settled for less than an employer's compensation lien. 784 F.2d at 647. Further, the court of appeals held in Collier that any judicial approval of an attempt to avoid the mandatory written

approval requirements of Section 33(g) "is nothing less than an amendment of the statute by judicial interpretation. The invitation to transgress the prerogative of Congress must be declined." 784 F.2d at 647 (emphasis added).

As this Court is well aware, in Nicklos Drilling Co. v. Cowart, 907 F.2d 1552 (5th Cir. 1990), the Fifth Circuit was again faced with the BRB's stubborn refusal to apply Section 33(g) as written. That court's frustration with the Board was evident from the blunt language used in its Cowart decision:

> Today we reverse a decision of the Benefits Review Board as contrary to the unambiguous language of the Longshore and Harbor Workers' Compensation Act (LHWCA) and to what we had thought was the clear mandate of this Court. Because the Benefits Review Board (BRB) has refused to heed Congress's and our earlier pronouncements, we write somewhat at length to make our position clear beyond peradventure. We have in the past consistently

> held, and we now reaffirm, that future LHWCA benefits must be denied an employee who fails to obtain prior consent by his employer/carrier to the settlement of his claim against a third party tortfeasor. There are no exceptions to this rule: Congress enacted none, we engraft none, and we will tolerate the engraftment of none by the BRB in cases within our appellate jurisdiction.

907 F.2d at 1552 (emphasis added).

The Fifth Circuit's decision, which has been affirmed by this Court, outlined the statutory scheme devised by Congress in drafting Section 33(g) and held that failure to comply with all of the statutory requirements "results in the forfeiture of further benefits under the LHWCA, in all cases." 907 F.2d at 1553 (emphasis added). A clearly upset court of appeals in Cowart chastised the BRB and attempted to put an end to the Board's adventuresome decisions in Section 33(g) cases:

> So that the BRB can be guided in its future decisions, and because

> we do not wish to again revisit the issue, we hold that there are no exceptions whatever to the "unqualified" language of Section 933. Rather, "the employer shall be liable for compensation . . . only if written approval from the employer and the employer's carrier . . . ." 33 U.S.C. §933(g)(1) (emphasis in original). In this instance "only" means "only" and, absent any room for interpretation or construction, we give it its intended meaning. Should Congress wish to give it another, it need only say so.

907 F.2d at 1554 (emphasis added).

In direct contrast to the firm position taken by the Fifth Circuit, and affirmed by this Court, the method of statutory interpretation employed by the BRB and the Fourth Circuit in the subject case is not only strained, but it adopts exactly the same arguments that the Board itself had flatly rejected as having "no merit" in Devine, 16 BRBS 147, 152 (1982). By holding that Section 33(g) somehow does not apply when both the Claimant and the

Employer are involved in the third-party settlement process, the Fourth Circuit has rewritten the relevant language of Section 33(g) to read: "If the claimant, and only if the claimant by himself, enters into a third party settlement..." This method of statutory construction is erroneous would lead to absurd results. For example, if the law prohibits "a person" from committing a crime, can person A escape the mandate of the law by arguing that both he and person B committed the crime?

The BRB squarely held in Devine, as did this Court in Cowart[2] that "Section 33(g) makes no exceptions for cases where the carrier in the workmen's compensation claim joins the claimant in agreeing to a third party settlement" and further added, in footnote 6, that the Director's novel

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[2] As noted above, in Cowart, the Employer funded the third-party settlement!

interpretative argument "that the Board is misconstruing the statute by applying Section 33(g) in cases where the third party, claimant, and compensation carrier all sign the settlement agreement thus has no merit." Devine, 16 BRBS at 152 (emphasis added).

Although the illusory distinction that a claimant's obligations are somehow different under the statute where the employer is involved in the third-party settlement process, which was urged upon the BRB and the Fourth Circuit by the Director, the relevant regulation, which was drafted by the Director, fails to make any such distinction. The Director-written regulations provide that a failure to comply the written approval and filing requirements of Section 33(g)results in termination of benefits whenever "the claim or legal action instituted against a third-

party results in a settlement agreement..." 20 C.F.R. §702.281(b). Indeed, contrary to loose interpretation argument that he made to both the Fourth and Fifth Circuits, the Director has now argued before this Court that Section 33(g) must be strictly construed. Cowart, 112 Sup.Ct. at 2594 (citing Brief for Federal Respondent 8, n.6).

II. SECTION 933(f) REQUIRES NONE OF THE JUDICIAL GLOSS PLACED UPON IT BY THE FOURTH CIRCUIT.

As this Court did in Cowart, with Section 33(g), interpretations of Section 33(f) must begin with the statute. Section 33(f) provides that "the employer shall be required to pay as compensation under this Act, a sum equal to the excess of the amount [of compensation payments due]... over the net amount recovered against such third person." 33 U.S.C. §933(f). In the Supreme Court's words §33(f) "mandates that

an employer's liability be reduced by the net amount a person entitled to compensation recovers from a third party." Cowart, 112 S.Ct. at 2596; see also Id. at 2598. Hence, Section 33(f) is designed to prevent a claimant from unjust enrichment and to protect the employer's right to recoup its inviolable lien from the actual tortfeasor. See e.g. Bloomer, 445 U.S. 78,79 (1980). As the Fourth Circuit acknowledged in its initial opinion below, Section 33(f) contains no provisions which place a burden upon the employer to prove what a claimant does with the funds received from a third-party settlement. Sellman, 954 F.2d at 244, Appendix C at 22-23. The flaw in the Fourth Circuit's second opinion below, and in the recent Ninth Circuit decision of Force v.

Director, OWCP, 938 F.2d 981 (9CA 1991), is three-fold.[3]

The Fourth and Ninth Circuits relied upon the "LHWCA's 'overall humanitarian policy' of compensating employees for injuries [which] requires that "all doubtful questions of fact be resolved in favor of the injured employee" Force, 938 F.2d at 985. However, Section 33(f) was not designed with the employee as the beneficiary. Rather, it was designed to protect the employer and to prevent unjust enrichment. Consequently, "humanitarian concerns" are not at issue and the burden should be placed upon the claimant to show that third party settlement funds were not for the claimant. The decision below

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[3]Again, Petitioner was precluded from making this argument to the Fourth Circuit, since that Court permitted no response to the Director's Petition for Rehearing. See Section III, infra.

permits claimants to execute third-party settlement agreements, which make no reference at all that settlement monies are being paid for loss of consortium, and then permits claimants to take the position that no Section 33(f) offset applies because the entire settlement proceeds were "intended" for loss of consortium. The error below is compounded by placing the burden of proof on the workers' compensation employer, who is often totally removed from the third-party settlement process, to prove, apart from the executed settlement agreement, what the claimant and the third-party defendant "really" intended. Primary determination of the issue herein requires review of the words of the written settlement contract.

Second, in any case, only doubtful questions of fact conceivably are entitled to deference toward the claimant. In the

subject case, as in most cases, there will be only be question of fact if the settlement contract is ambiguous. As the Fourth Circuit noted in the first decision, the settlement agreements herein are not ambiguous and make no reference to payment of loss of consortium! The Fourth and Ninth Circuits, however, have incredibly held that the well-accepted parol evidence principles may be ignored and that the parties are not bound by the negotiated terms of settlement contracts that they have signed.

Third, the Fourth Circuit has placed a heavy and unwarranted burden on the employer to divine and prove the intentions of the parties to the settlement, while creating an exception to the mechanism Congress enacted to protect the employer--Section 33(g). Strict adherence to the requirements of Section 33(g), as required

under Cowart, makes the judicially created scheme of burden of proof unnecessary, in most cases, because the employer will have had the opportunity to approve in writing the third-party settlement, as well as any purported apportionment for loss of consortium. Hence, the judicially-created exception to Section 33(g), as well as the judicially rewritten Section 33(f), adopted below, combine to create a double burden on employers clearly not intended by Congress, whose purpose behind Section 33 was to protect employers and to provide the balance that is a fundamental premise of workers' compensation.

III. THE FOURTH CIRCUIT VIOLATED THE DUE PROCESS RIGHTS OF THE PETITIONER BY GRANTING THE DIRECTOR'S UNTIMELY PETITION FOR REHEARING AS TO THE SECTION 33(f) ISSUE AND BY REVERSING ITS PRIOR DECISION WITHOUT GRANTING PETITIONER AN OPPORTUNITY TO BE HEARD.

On January 22, 1992, the Fourth Circuit reversed the BRB's decision as to the interpretation of Section 33(f) and granted the Petitioner a right to offset the amount of the Sellman settlement against periodic benefits. Sellman, 954 F.2d at 243-45, Appendix C at 16-26. On February 18, 1992, the Director filed a Petition for Rehearing and Suggestion for Rehearing En Banc. Rule 40 of the Federal Rules of Appellate Procedure, provides in pertinent part, that

> "[n]o answer to a petition will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such request."

F.R.A.P. 40(a) (emphasis added). The Fourth Circuit's own rules, I.O.P. 40.6, further provides that "[t]he court may direct the filing of additional briefs, or the parties may seek leave of court to file additional briefs." (emphasis added).

By correspondence dated February 26, 1992, counsel for Petitioner requested leave to oppose the Petition for Rehearing filed by the Director and to respond to all matters raised therein. Appendix I. On February 27, 1992, the Fourth Circuit issued an Order, without explanation, denying Petitioner's request. The court itself never requested that the Petitioner file a response. Nonetheless, despite Rule 40's provision that a Petition for Rehearing will not ordinarily be granted in the absence of such a request" (i.e., an opportunity to respond), the Fourth Circuit issued its supplemental opinion on June 17,

1992, which reversed its prior decision regarding Section 33(f). Appendix E.

While the Petitioner concedes that Rule 40 does provide that the Court may grant the petition "without reargument," the Petitioner submits that substantial justice, fundamental fairness and due process require, in this instance, that the Petitioner should have been given the opportunity to respond. The Fourth Circuit placed the Petitioner in the unenviable and unfair position of having had its argument on the Section 33(f) issue adopted, and then rejected, without giving the Petitioner an opportunity to even respond to the additional arguments made by the Director, despite the fact that Rule 40 provides that "ordinarily" such an opportunity will be given. Due Process under the Fifth Amendment means, at minimum, a meaningful opportunity to be

heard. See e.g., Mullane v. Central Hanover Bank, 339 U.S. 306 (1950); Goldberg v. Kelly, 397 U.S. 254 (1970). In this case, the Fourth Circuit has denied Petitioner any opportunity to be heard on the Section 33(f) arguments presented by the Director's Petition for Rehearing.

In addition, the Fourth Circuit violated its own rules in allowing the Director's ex parte and untimely Petition for Rehearing. After the Fourth Circuit partially reversed the findings of the Benefits Review Board, I.T.O. Corporation v. Sellman, 954 F.2d 239 (4th Cir. 1992), it impermissibly gave the Director, OWCP, leave to file a Petition for Rehearing after the time for such a petition had expired. The court's initial opinion was filed on January 22, 1992. Sellman, 954 F.2d at 239, Appendix C at 1. Under that court's own rules, a Petition for Rehearing

is timely if it is filed within fourteen days after the entry of judgment:

> The Court strictly enforces the time limits for filing petitions for rehearing and suggestions for rehearing en banc. The clerk's office will deny as untimely any petition or suggestion received in the clerk's office later than 14 days after the entry of judgment. The only grounds for an extension of time to file a petition, or to accept an untimely petition are as follows:
>
> > i. a request pursuant to the provisions of I.O.P. 40.3,
> >
> > ii. the death or serious illness of counsel... or a party...
> >
> > iii. an extraordinary circumstance wholly beyond the control of counsel... .

4th Cir. R. I.O.P. 40.2 (1992) (Emphasis supplied).

The Director, OWCP, filed its Petition for Rehearing and Suggestion of Rehearing En Banc on February 18, 1992-- twenty-seven days after the judgment was entered. The only exception to I.O.P. 40.2 that could

conceivably apply in the present case would have been the exception outlined in Rule 40.3. However, I.O.P. 40.3, by its own terms, does not permit the Director, OWCP, to file a Petition for Rehearing after time has expired for other litigants:

> I.O.P. 40.3. Applications From the United States for an Extension of Time Within Which to File a Petition for Rehearing to Enable the Solicitor General's Office to Review the Merits of the Case.
>
> > Applications from the United States for an extension of time within which to file a petition for rehearing before the Fourth Circuit will be reviewed on a case-by-case basis. If sufficient grounds for an extension appear, an extension of up to 30 days will be granted. The need of the Office of the Solicitor General for time to conduct a thorough review of the merits of the case will be considered legitimate grounds for an extension.

4th Cir. R. I.O.P. 40.3. (Emphasis added.)

It is clear that the only additional "grounds for extension" granted by I.O.P. 40.3., beyond those listed in I.O.P. 40.2,

is "[t]he need of the Office of the Solicitor General for time to conduct a thorough review..." Had Petitioner been given minimal procedural due process, and been permitted to reply to the Director's untimely Petition for Rehearing, Petitioner could have pointed out that the Department of Labor, Office of the Solicitor of Labor, is not remotely connected with the Department of Justice, Office of the Solicitor General.[4]

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[4] The Director, OWCP, is represented by the Office of Solicitor of Labor, whose function is to provide "the Secretary of Labor and departmental officials with the legal services required to accomplish the mission of the Department of Labor and the priority goals established by the Secretary" Office of the Federal Register, The United States Government Manual 1991/92 at 407 (Berman Press 1991)(emphasis supplied).

In contrast, the Solicitor General

> ...represents the U.S. Government in cases before the Supreme Court. He decides what cases the Government should ask the Supreme Court to review and what position the Government should take

Had the Labor Solicitor taken the trouble to review the case with the Solicitor General, he might have discovered the fact that the Solicitor General was arguing against the Labor position regarding Section 33(g), and in favor of

> in cases before the Court. Also, he supervises the preparation of the Government's Supreme Court briefs and other legal documents and the conduct of oral arguments in the Court. He or his staff argue most of the Government's cases in the Supreme Court. The Solicitor General's duties also include deciding whether the United States should appeal in all cases it loses before the lower courts.

Id. at 365 (emphasis supplied).

The United States is not in any way a party to the litigation at issue here. It is rather the Director, OWCP, who insinuated the Department of Labor into this suit, through its Solicitors. Where the Untied States is not a party to the litigation, any conceivable rationale for granting leave to file a Petition for Rehearing out of time, as the Fourth Circuit is willing to do when the Solicitor General requires additional time, is inapplicable. Here, there is no danger that the rights of the Untied States will be affected adversely by the outcome of the suit.

Petitioner's position of strict interpretation of Section 33(g), before the Supreme Court in Cowart.

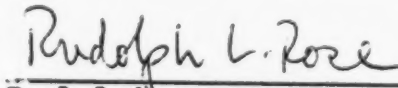
If for no other reason, the June 17, 1992, decision of the Fourth Circuit is erroneous because it was made on the basis of a Petition for Rehearing filed, without a recognized ground for extension, nearly two weeks after the time for such a filing had expired. If a Court of Appeals issues detailed local procedures, it must be held to those procedures. It is a violation of procedural due process for the court to permit an untimely Petition for Rehearing without at least permitting Petitioner to respond. U.S. Constitution, Amendment V. After accepting this "back-door" Petition from the Director, OWCP, it is inconceivable that the court would then proceed to grant the Petition, reversing its own prior decision, again without

permitting Petitioner a meaningful opportunity to respond to the entirely new legal arguments raised in the untimely petition.

CONCLUSION

For all of the foregoing reasons, Petitioner submits that a Writ of Certiorari should issue and requests that the Court overrule the decision of the Fourth Circuit below.

Respectfully submitted,



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APPENDIX A

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

****

In the Matter of *

WILLIAM SELLMAN, *

Claimant * Case No. 85-LHC-2268

v. * OWCP No. 4-17744

I.T.O. Corporation of Baltimore, *

Employer *

****

Paul D. Bekman, Esq.,
For the Claimant

Rudolph L. Rose, Esq.
For the Employer

BEFORE: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER - AWARD OF BENEFITS

This is a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., (hereinafter referred to as the Act). In accordance with the Act and the regulations thereunder, this case was

referred to the Office of Administrative Law Judges by the Deputy Commissioner for formal hearing (20 C.F.R. §702.331) to determine the Claimant's eligibility for compensation. A hearing was held before the undersigned Administrative Law Judge in Baltimore, Maryland on September 11, 1986, at which time the parties were an opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.[1]

In evaluating the evidence to reach a decision in this case, I have been guided by the principle that all doubts must be resolved in favor of the Claimant, which is in keeping with the remedial and humanitarian purposes of the Act. Wheatley

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[1]The following abbreviations will be used when citing to the record in this matter: EX - Employer's Exhibit; CX- Claimant's Exhibits; TR - Transcript of the hearing.

Additionally, as the trier of fact, I may accept or reject all or any part of the evidence and rely on my own judgment to resolve factual disputes or conflicts in the evidence. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962).

STIPULATIONS

The parties have stipulated, and I find, as follows: (TR 13-15)

1. The Act applies to this claim.
2. The Claimant and the Employer were in an employer/employee relationship at the time of the accident/injury.
3. The accident/injury arose out of and within the scope of employment.
4. The date of the accident/injury was July 10, 1979.

5. The date when the Employer was advised or learned of the accident/injury was July 10, 1979.

6. Timely notice of injury was given to the Employer.

7. The Employer filed a first report of accident on July 13, 1979.

8. The Claimant filed a request for compensation on July 24, 1979.

9. Claimant filed a timely Notice of Claim.

10. The Notice of Controversion was filed on August 2, 1984.

11. (a) Temporary total disability existed from July 11, 1979, to July 17, 1979.

    (b) Benefits were paid at the rate of $291.22 per week from July 11, 1979, through July 21, 1984.

(c) The Claimant was provided medical benefits.

12. The last payment of benefits was made on July 21, 1984, and the Employer filed a Notice of Suspension of Compensation Payments on August 2, 1984.

13. The Claimant's average weekly wage was $437.00.

14. The date of maximum medical improvement was July 17, 1979.

15. The Claimant has not returned to his regular employment with the Employer since the date of injury.

16. Describing briefly the nature and extent of the injury, the Claimant sustained a fracture of the skull.

17. The accident/injury occurred aboard the Algenib at Pier 1, Clinton Street, Marine Terminal, Baltimore, Maryland.

18. The accident/injury occurred on July 10, 1979 and the Claimant's place of residence is Baltimore, Maryland.

ISSUES

The issues remaining for adjudication are: (TR 16-18)

1. Is the $250,000.00 that was paid to Mrs. Sellman subject to the Employer's compensation lien for offset rights?
2. Did the Employer contractually agree to accept $250,000.00 as full satisfaction of its compensation lien?
3. Is the Employer estopped to deny that the $250,000.00 paid to Mrs. Sellman was subject to the compensation lien, and further to deny that payments made directly

to Mrs. Sellman constituted payments for loss of consortium?

4. Assuming arguendo that the Employer is not estopped from asserting its lien, nor that it contractually agreed to waive same, does the payment to Mrs. Sellman constitute a recovery for loss of consortium that is not subject to an offset?

5. Does the LS-33 filing requirement apply in this case?

6. Assuming that an LS-33 had to be filed in this case, did the Deputy Commissioner suspend the filing requirement?

7. Has the Employer waived, or is the Employer otherwise estopped from asserting the filing of the LS-33?

8. Is the Employer required to pay for the guardianship proceeding

required by a the Deputy Commissioner, of approximately $600.00 paid by Mrs. Sellman to the attorneys who secured the Guardianship Order, dated June 14, 1982?

9. Is the Employer and self-insured entitled to an offset of $250,000.00 against compensation and medical payments under the Longshoremen's and Harbor Workers' Compensation Act, since the Claimant received $250,000.00 in settlement of his third-party claim, 33 U.S.C. §933, and there is a deficiency under the Act in that the Employer received less than the full compensation lien?

10. Is the Employer and self-insured entitled to terminate all future benefits to the Claimant, since

the Claimant failed, (1) to obtain a written approval from the Employer of its waiver of its §33 right to suspend compensation payment; and (2) to timely file an LS-33 Form regarding its third-party settlement with the Deputy Commissioner within the time period mandated by §33(g) of the Act?

STATEMENT OF CASE

The Claimant, William H. Sellman, was represented at the hearing by his wife, Rhoda Sellman, who was appointed as his legal guardian on June 14, 1982. (CX 4). At the time of the hearing, seven years after his injury, Mr. Sellman was 46 years old. (TR 61).

Claimant was employed as a longshoreman by Atlantic and Gulf Stevedores, a firm

that in 1983 was merged into I.T.O. Corporation, the Defendant in this case. (TR 33). On July 10, 1969 Claimant fell approximately forty feet into the hold of the ship on which he was working, the Algenib. As a result of the fall, he sustained a severe head trauma and fractured skull, which necessitated an operation on his brain. (TR 32). Following the operation he was comatose, required a tracheotomy tube and received oxygen. (TR 62). The tube and oxygen have been removed and he occasionally recognizes visitors, but from 1981 to the present time he has been confined to a long-term medical care facility and requires total care. (TR 62). There has been no change in his condition for the past five years. (TR 63). The cost of his care exceeds $100,000.00 per year. (TR 67).

Claimant filed a claim under the Act on July 24, 1979, and was paid compensation payments by the Employer from July 11, 1979, through July 21, 1984. (TR 14). The Employer also paid medical benefits and continued to do so as of the date of the hearing. (TR 75).

In 1982, the Employer (then Atlantic & Gulf Stevedores, Inc.) joined Plaintiffs William Sellman, Rhoda Sellman and the Sellman children in a third-party lawsuit against several Defendants including the Algenib and its owners and charterers. (EX 8). Plaintiff William Sellman by his wife and legal guardian Rhoda Sellman pursued six causes of action against the Defendants alleging negligence, breach of warranty, strict liability in tort, and in admiralty under the Longshoremen's and Harbor Workers' Compensation Act a variety of negligent behaviors. In the seventh listed

cause of action, Plaintiffs William Sellman and Rhoda Sellman both, (as required under Maryland law) (TR 104), alleged loss of consortium and jointly claimed damages as compensation for the loss. The eighth listed cause of action was a claim by the Sellman children for compensation for damage to their filial relationship. Finally, the ninth listed cause of action was claim by Atlantic & Gulf Stevedores, Inc. for compensation "for the medical and hospital care and treatment which it has and will supply to William H. Sellman, Jr., Plaintiff." (EX 8).

The lawsuit was brought in the Superior Court of Baltimore City and later removed to the United States District Court for the District of Maryland. The Plaintiffs' attorneys were A. Owen Hennegan, at that time compensation lawyer and third-party lawyer for Atlantic & Gulf (TR 103), and

Roger L. Smith, counsel for the Sellmans (TR 104). Shortly after the case began, in January of 1983, (TR 303), Mr. Hennegan became a judge in Baltimore County and his son, John O. Hennegan, replaced him as counsel for the Employer. (TR 105). Mr. Smith testified that it was understood from the start that all expenditures by I.T.O. for Mr. Sellman, including medical care, were to continue. (TR 110).

On June 1, 1984, the Plaintiffs were notified by Mr. Geoffrey S. Tobias, American attorney for the owners of the Algenib, that the ship, which was Defendants' only asset, was en route to Rotterdam to be sold pursuant to a mortgage foreclosure and that no American lien would have priority. (EX 17). At this time, I.T.O. had a lien against Mr. Sellman that was valued at approximately $525,000.00 and that was accumulating at approximately

$100,000.00 to $150,000.00 per year for compensation and medical benefits paid under the Act. (TR 427).

Intensified negotiations to reach a settlement followed the notification. On June 6, 1984, a meeting at the office of Mr. Tobias was attended by Gunter Kohler, the ship owner's lawyer from Germany; David Skeen, attorney for the ship's charterer; Mr. Hennegan, representing I.T.O.; Mr. Smith, representing Mrs. Sellman; and Mr. Tobias, representing the ship owner.

At this meeting, there was a discussion about representation of clients. Mr. Smith testified that he stated he was representing Rhoda Sellman in her loss of consortium claim (TR 122) and that it was his understanding that Mr. Hennegan's negotiations for I.T.O. included Mr. Sellman's claims because all of the money

Mr. Sellman got would go to I.T.O. (TR 211).

Mr. Hennegan testified that he had been told by I.T.O. that he had no authority to make any decisions or agreements (TR 311), so he took notes at this meeting in order to contact I.T.O. and tell them what happened. (EX 18). He never told Mr. Smith about his limited authority. (TR 343).

At the meeting, Mr. Tobias introduced a single settlement offer of $200,000.00 total for all Plaintiffs. (CX 7). During the discussion of this offer, Mr. Tobias emphasized that the Defendant had a good case on liability, and it was everybody's interest to settle. (TR 234). He testified that Mr. Smith's goal in the negotiations included continuation of benefits to Mr. Sellman (TR 236), although neither Mr. Tobias nor Mr. Hennegan could

specifically recall a discussion about the continuation of benefits. (TR 272, 315). Mr. Smith testified that the lawyers present explained to Mr. Hennegan that the offer could not be accepted unless I.T.O. waived or compromised its lien entirely. (TR 121). The discussion resulted in rejection of the offer because it was too low and negotiations continued after the meeting. (TR 121).

On June 8, 1984, Mr. Kohler and Mr. Tobias met with Mr. Philip Palazzo, then Workers' Compensation Claims Manager for I.T.O., in his office in New York. An offer of $400,000.00 with $200,000.00 to I.T.O. and $200,000.00 to the Sellmans was deemed unacceptable by Mr. Palazzo. (TR 430). Following the rejection, Mr. Kohler offered $250,000.00 to I.T.O. and Mr. Palazzo told Mr. Smith that I.T.O. was prepared to accept this offer. (TR 126).

Mrs. Sellman held out for an equal amount in settlement of her claim and, on June 11, Mr. Kohler informed Mr. Palazzo that the offer was $250,000.00 for each of them. (TR 128, 431).

In the 24-hour period between June 11 and June 12, 1984, two drafts and a final settlement agreement were written in separate parts for I.T.O. and Rhoda Sellman. (EX 10, 11, 12, 13, 14, 15). The first drafts of both agreements contained the following sentence: "It is to be noted that responsibility of satisfaction of this lien remains with Mr. Sellman and his attorney." (EX 10, 13). Mr. Smith stated that this "was 100% opposite of the agreement that we had with Mr. Hennegan" (TR 132), so the sentence was removed from the second drafts. In fact there was no mention of the lien in the second drafts.

(EX 11, 14). The final drafts include the following clause (EX 12, 15):

> It is to be further noted that there is an alleged outstanding workmen's compensation lien for benefits paid Mr. Sellman under the terms of the United States Longshoreman's and Harbor Workers' Compensation Act. It is to be noted that responsibility of satisfaction of this lien remains with Mr. Sellman in the event that there is any recovery of any sums of money from any other party not named as a Defendant herein.

Mr. Smith testified that Mr. Tobias, "as did everyone else", assured him that the paragraph had been changed by I.T.O. to "reflect the agreement we had" (TR 191) and that it meant that if, in the future, Mr. Sellman received money from another party, as in a medical malpractice suit, he would then have to satisfy the lien. (TR 135).

The drafts were prepared by Mr. Tobias in his office. He testified that he did not draft the lien clause and could not recall who did. (TR 240). Mr. Hennegan

testified that he had no role in drafting the agreements (TR 317) and that Mr. Palazzo "took over and he did the negotiations." (TR 316). Mr. Hennegan testified that he did not recall any discussions with Mr. Smith about the lien clause, but he recalled that Mr. Palazzo was "looking for specific wording." (TR 322). When questioned about his earlier deposition testimony that the revised language was added by Mr. Palazzo, Mr. Hennegan could not "recall him specifically giving me that wording word for word." (TR 367).

Mr. Hennegan stated that he read every draft of both agreements to Mr. Palazzo over the phone, and he was told not to sign a settlement agreement without discussing it with Mr. Palazzo. (TR 316). Mr. Hennegan stated that when he received the third draft of the I.T.O. agreement he

called Mr. Palazzo, read the agreement to him word for word, and was told to sign it. (TR 320). He stated that Mr. Palazzo told him there was a specific form related to the lien that he (Palazzo) was not going to sign. Mr. Hennegan did not inform Mr. Smith. (TR 373).

In contrast to this testimony, Mr. Palazzo stated that he spoke to Mr. Hennegan only once (TR 443), that he (Palazzo) never added any language to any agreement (TR 444), that Mr. Hennegan had the authority to make changes in the settlement agreement (TR 444), that Mr. Hennegan was the I.T.O. attorney of record and was required to protect I.T.O.'s interests (TR 444), and that Mr. Hennegan was authorized to sign the settlement agreement if he (Hennegan) determined it was appropriate. (TR 447). Mr. Palazzo also stated that Mr. Hennegan did not read

was appropriate. (TR 447). Mr. Palazzo also stated that Mr. Hennegan did not read the full agreement to him, but he recalled from his disposition testimony that Mr. Hennegan read the portion pertaining to the workmen's compensation lien and that Mr. Palazzo had no comments. (TR 450). He stated, in addition, that he did not recall stating that he would not sign a particular form. (TR 452).

On June 12, 1984, the preliminary agreements were signed by the attorneys and immediately forwarded to Rotterdam to stop the arrest of the ship. (TR 128). Mr. Smith testified that just before he signed the agreement, he spoke to Mr. Hennegan about the LS-33.[2] Mr. Hennegan was not

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[2] Section 33(g)(1) of the Act provides:

> If the person entitled to compensation (or the person's representative) enters into a settlement with a third person

familiar with the form and Mr. Smith explained it. (TR 162). Mr. Smith did not feel it was necessary to file the LS-33 in this case because I.T.O. negotiated its own settlement for itself and Mr. Sellman. However, even though filing the form would be just a formality, he felt that Mr. Hennegan should sign the form for I.T.O. Mr. Hennegan agreed. (TR 163).

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referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the Employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement be entered into.

The form referred to above is the LS-33.

Mr. Hennegan testified, on the other hand, that despite the fact that his records showed a phone call from Mr. Smith on June 12 (Ex 32), he was out of his office and he had no conversation with Mr. Smith about the LS-33, "specifically about that form, I mean using the number, no". (TR 329). He did recall that in August, Mr. Smith talked about "routine paperwork" but he never received it. (TR 330).

The final Algenib settlement agreements were executed on June 18, 1984. Both were contingent on receipt of the money by July 10, 1984. The Sellman agreement, signed by Roger Smith, Geoffrey Tobias and Rhoda Sellman on her own behalf and on behalf of her husband and children, the signature thus directed by Mr. Tobias (TR 257), specifies that it will be null and void unless and until it is approved by the Circuit Court for Baltimore County. (EX

12). The I.T.O. agreement, signed by Roger Smith, John Hennegan, Geoffrey Tobias, and Rhoda Sellman on behalf of her husband, states that it will be null and void unless and until the companion agreement is approved by the Circuit Court for Baltimore County. (EX 15). The approval was a requirement imposed by the ship owner because of the Sellman guardianship which was under the jurisdiction of the Baltimore County Circuit Court. (TR 245). Mr. Tobias testified that without the court approval both settlement agreements would have been null and void and neither party would have been paid. (TR 249).

As part of the process of getting the Sellman agreement approved by the Court, Mr. Smith prepared a Petition to Compromise Claim. Paragraph nine of the petition stated that I.T.O. would remain liable for uninterrupted compensation and medical

benefit payments under the Act. Paragraph ten states that the Sellman payment was for loss of consortium, separate from and not subrogable to the workmen's compensation claim. (CX 3). According to Mr. Smith, these provisions were not included in the Algenib settlement agreements themselves because of the press of time in getting the agreements out before the June 12, 1984, deadline, and the parties signed the Algenib agreements "always with the understanding that the settlement was based upon the Petition for Comprise, setting out the full agreement." (TR 140).

Mr. Tobias testified, as well, that, "The approval of the petition, the execution of the Order by the judge of the Circuit Court was part and parcel of the whole package, absolute." (TR 286). He also testified that paragraph nine was a prime concern of Mr. Smith (TR 355), that

there was never a question in his own mind about continuation of compensation payments, and he could not recall any discussions contrary to that throughout the negotiations. (TR 407).

A draft copy of the Petition was submitted by Mr. with a request for comments to Mr. Tobias, with a copy to Mr. Hennegan, on June 20, 1984. (EX 3). There was no response from Mr. Hennegan (TR 145), but Mr. Tobias returned his copy with comments on June 25. A copy of this correspondence was sent to Mr. Hennegan. (EX 22, CX 9). Mr. Smith revised the petition to incorporate Mr. Tobias' suggestions presented it to Mrs. Sellman for signature, and sent it to the Circuit Court for Baltimore City, with copies to Mr. Hennegan and Mr. Tobias, on June 28, 1984. (CX 10).

After the Circuit Court judgment signed the Order approving the Petition for Compromise on July 2, 1984, Mr. Smith, on July 6, 1984, (CX 11) sent a copy of the Petition and Order to Mr. Tobias with carbon copies to Mr. Hennegan and Ms. Linda Harren, the Insurance and Safety Manager at I.T.O. (TR 455). On July 10, 1984, checks for $250,000.00 each were delivered to I.T.O. and to Mr. Smith as attorney for the Sellmans. (EX 25 and 26). Mr. Smith (TR 152) and Mr. Tobias (TR 258) both testified that during this entire process, until after the issuance of the checks, nothing was heard from anyone at I.T.O. about any inconsistency or problem with the Petition, or about cutting off compensation benefits to the Claimant. Mr. Hennegan testified that even though I.T.O. had an interest in getting the court approval (TR 575),

nothing in the Petition disturbed him. (TR 378).

On August 2, 1984, pursuant to instructions from Mr. Palazzo (EX 28), Ms. Harren wrote to Mr. Smith and requested a breakdown of expenses and the net proceeds remaining to Mrs. Sellman. (EX 29). At the same time she filed an LS-207 with the Deputy Commissioner suspending compensation to Claimant as of July 21, 1984, and until the third party settlement monies awarded to Claimant were offset. (EX 30). Mr. Smith immediately phoned Ms. Harren expressing his shock. (TR 157). On August 8, 1984, Mr. Smith met Ms. Harren at the office of the Deputy Commissioner Bruno DiSimone where they informed the Deputy Commissioner that the settlement was concluded on July 10, 1984, and discussed the LS-33. When Ms. Harren stated that she would refuse to sign it, Mr. Smith

requested a suspension of filing the form (TR 159) and followed up the oral request with a letter dated August 10, 1984. (CX 13). Mr. DiSimone agreed to the suspension and on August 22, 1984, he was issued an Order which extended indefinitely the time for filing the LS-33. (CX 14).

After I.T.O. suspended payments to Claimant, Mr. Smith contacted Mr. Tobias regarding his understanding of the Algenib settlement agreements. Mr. Tobias testified that his understanding then and now was that I.T.O. was to get $250,000.00, the Sellmans were to get $250,000.00 and the compensation payments were to continue. (TR 263). Furthermore, Mr. Tobias testified that during a cocktail party conversation with Mr. Hennegan, Mr. Hennegan agreed with him as to his understanding that the settlement was intended to be $250,000.00" free and clear

to the Sellmans" and $250,000.00 "period free and clear to I.T.O." (TR 421).

PAROL EVIDENCE RULE

Counsel for the Employer voiced a continuing objection throughout the hearing to any testimony or exhibit which would attempt to alter the terms of the third party lawsuit settlement agreements that were executed by the parties on June 18, 1984. The objection is based on the parol evidence rule as applied in Maryland, where the formation and performance of the agreements occurred.

Professor Corbin states the parol evidence rule as follows:

> Where two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting

the writing. 3 Corbin on Contracts §573 (1963).

Professor Williston goes on to say that where the writing is intended to be final but incomplete, it is said to be a partial integration; although such a writing may not be contradicted by evidence of prior agreements, it may be supplemented by evidence of consistent additional terms. 4 Williston on Contracts §636 (3d ed. 1961).

Claimant's counsel contends that the Algenib settlement agreements were not fully integrated writings because both agreements would be null and void unless payment was timely received and the Sellman agreement was approved by the Circuit Court for Baltimore County; therefore, they contemplated the creation of additional documents. Counsel argues that where the signed writing was not intended to constitute the whole agreement, to determine the parties' intent, the

surrounding facts and circumstances must be considered.

Under Maryland law, parol evidence may be admitted where there is doubt as to meaning or application of a writing. Lambdin v. Dantzebecker, 169 Md. 240, 181 A.353 (1935); Winand v. Case, 154 F.Supp. 529 (D.C. Md. 1957). In addition, where the contract was intended to constitute the whole agreement, extrinsic evidence may be used to establish additional terms. State, etc v. Cherry Hill and Gravel Company, Inc., 51 Md. App. 299, 443 A.2d 628 (1982). Furthermore, evidence of transactions that took place after execution of the agreements is not banned by the rule and may be introduced to show the construction placed on the agreements by the parties. Freeman v. Stanbern Construction Co., 205 Md. 71, 106 A.2d 50 (1954); Naller v. First

National Bank of Baltimore, 412 F.2d 881 (1969).

Claimant's counsel argues that the Algenib settlement agreements include the Petition to Compromise Claim that was submitted in order to obtain the stipulated court approval of the Sellman agreement. He further contends that the lien provision of the settlement agreements means, in plain language, that Claimant is responsible to the Employer only if there is a recovery of money from some defendant other than those involved in the instant lawsuit and that therefore the Employer has waived its lien and right to offset compensation payments.

The Employer's counsel argues that court approval of the Sellman agreement did not affect the I.T.O. agreement and that there is no language in the settlement agreements indicating that I.T.O. waived

its lien and right to offset compensation payments against the recovery received by the Sellmans.

Since there is a clear dispute about the meaning of the provisions in the Algenib agreements concerning court approval and the outstanding lien, the settlement agreements were not fully integrated as they required additional documents to take effect. Thus, I find that parol and other extrinsic evidence may be admitted to determine the intent of the parties by examining the surrounding facts and circumstances.

DISCUSSION

A. Petition to Compromise Claim

Claimant's counsel asserts that there was an understanding among the parties from the start of the third party litigation that the disputed provisions of the

Petition, wherein the Employer remains liable for payments under the Act and the Sellman payment was for loss of consortium, were to be considered part of the Algenib settlement agreements. Employer's counsel argues that there is no evidence to support this assertion. Employer's counsel argues, in addition, that the Sellman settlement agreement covers William Sellman as well as Rhoda and children. Also, it releases all claims of the Sellmans against the Defendants, and thus cannot be interpreted to refer only to a loss of consortium claim.

The testimony of the parties regarding conversations and discussions at the June 6, 1984, meeting and during subsequent negotiations is conflicting. However, I am persuaded by the testimony of Mr. Geoffrey Tobias, who explained that the wording of the release and inclusion of the name of

William Sellman on the Sellman document were done at his insistence to protect his client. Mr. Tobias' testimony corroborated the testimony of Mr. Roger Smith that there was an underlying understanding that the Sellman settlement was for loss of consortium and not subject to offset under the Act, and that I.T.O. was to remain liable for compensation and medical payments to Mr. Sellman. Mr. Tobias was in the unique position of having been intimately involved in every phase of the settlement process with all of the parties. As the attorney for the defendant payor he had no interest, beyond protecting his own client from further suit or damages, in how the proceeds were distributed. I find his testimony extremely important, very detailed and informed with respect to dates, places and intentions of the parties, and highly credible.

Any other interpretation of the events in question is so implausible as to strain credulity. Before the third-party lawsuit began, I.T.O. was voluntarily paying compensation and medical benefits under the Act to the Claimant. The only reason Claimant went to the trouble of enlisting I.T.O.'s support in pursuing the lawsuit, going through a guardianship proceeding, hiring attorneys, and actively litigating and negotiating this matter was to achieve a benefit, not a detriment, for the Sellman family. Certainly the understanding was not for the sole purpose of enriching I.T.O.

Furthermore, I.T.O. was given every opportunity while the petition was being prepared to comment, criticize, amend, object, or even voice an opinion that this document was contrary to the Algenib settlement agreements or contradicted any

of the agreements' terms. I.T.O. understood that the court would not have approved the Sellman agreement unless the interests of William Sellman were protected. I.T.O. also understood that if the Sellman agreement were not approved, the I.T.O. agreement would have failed as well. Therefore, for I.T.O. to claim it had no interest in either the Petition or the court approval proceeding is not credible.

Under Maryland law, where circumstances are such as to require a silent party to speak, so that an injured party may take steps to protect himself against a loss which might otherwise result, the silent party is estopped from asserting the defense he would have had but for his silence. Ganley v. G.&W. Ltd. Partnership, 44 Md. App. 568, 409 A.2d 761 (1980). Where a party with a reasonable opportunity

to object benefits from the actions or representations of another without objecting, he is estopped from objecting when the other party is misled or injured by the failure to object. Laurel Race Course v. Regal Construction, 274 Md. 142, 333 A.2d 319 (1975); Mohr v. Universal C.I.T. Credit Corporation, 216 Md. 197, 140 A.2d 49 (1958).

In this case, I.T.O. did not protest the terms of the Petition when it had the opportunity to do so, but instead allowed the other parties to the settlement agreements to proceed under the terms of the Petition. Since there had been from the beginning an underlying understanding that these terms formed the very basis for the settlements, I.T.O. having benefitted from the proceedings is now estopped from denying that the Petition is included in the settlement agreements.

I find that the requirement for approval of the Sellman agreement by the Circuit Court for Baltimore County contemplated the creation of another document. This document was the Petition to Compromise Claim. Its terms are incorporated into both settlement agreements because the validity of the I.T.O. agreement depended on court approval of the Sellman agreement.

B. The LS-33 and Section 33(g) of the Act

Counsel for the Employer contends that the Employer has a statutory right to terminate all payments to the Claimant because the Claimant failed to comply with the mandatory requirements of Section 33(g) of the Act (supra at note 2) which provides that payment shall be terminated if the Claimant fails to obtain the Employer's written approval of a third party

settlement on an LS-33 form prior to or at the time of settlement. Employer asserts that because Claimant has never filed the LS-33 form the Employer is entitled to terminate all rights to compensation and medical benefits, as provided in Section 33(g)(2) of the Act.

In support of his argument, Counsel cites several court cases and Benefits Review Board decisions. First of all, the fact that the language of the statute is mandatory and that substantial compliance is insufficient was decided in Devine v. National Creative Growth, INc., 16 BRBS 147 (1982) and Dorsey v. Cooper Stevedoring Co., 18 BRBS 15 (1986). In O'Leary v. Southwest Stevedoring Co., 7 BRBS 144 (1977), aff'd mem., 622 F.2d 595 (9th Cir. 1980), the Board found that the written approval and filing requirements of Section 33(g) apply when the employer is making

voluntary payments as well as when compensation payments are made after an award.

The last cited case is Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644 (5th Cir. 1986), in which the Fifth Circuit reversed the Board's finding that the Section 33(g) requirements were not applicable where the employer contractually waived its subrogation rights against the third party defendant. Instead the Court found no waiver of subrogation exception to the requirement that an employer obtain written consent for settlement with a third party tortfeasor. The underlying public policy rationale for that position is:

> to ensure that employer's rights are protected in a third party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f). Collier v. Petroleum Helicopters, Inc., 17 BRBS 80, 82 (1985). See also Dorsey, supra, at 27.

However, none of these cases deals with the situation in which the employer from the start is a co-plaintiff in the third party lawsuit and negotiation and enters into its own settlement agreement with the defendants, as was done in this case. This was certainly not a case where the Claimant was in control of the lawsuit and was acting unilaterally against the Employer's interest. On the contrary, the Employer was able to recover at least a portion of its expenditures and willingly settled for that recovery. The settlement agreement I.T.O. signed expressly limited Claimant's responsibility based on any future recoveries from other sources. The separate settlement agreement negotiated on behalf of the Sellmans was a recovery for loss of consortium. As such, it is excluded from the offset and lien provisions of Section 33. American Export

Lines, Inc. v. Alvez, 446 U.S. 274 (1980); Brandt v. Stidham Tire Company, 16 BRBS 277 (1984).

The conclusions drawn here are consistent with policy concerns. The Act should be construed in order to further its purpose of compensating longshoremen and harbor workers "and in a way which avoids harsh and incongruous results." Voris v. Eikel, 346 U.S. 328 (1953); Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977).

If Section 33(g) were to be applied as Employer argues, the result would be harsh and unfair. Accord Williams v. Halter Marine Service, Inc. and U.S.P & I Agency, _____ BRBS _____, BRB No. 84-1447 (Apr. 30, 1987). The Employer orally agreed to execute the LS-33 form, reaped the benefits from its settlement agreement and then reneged on signing the form for

the sole purpose of defeating Claimant's right to recover. The purpose of Section 33(g) can be satisfied by the less restrictive approach adopted in this opinion. See Devine, supra (Opinion of Ramsey, C.J., dissenting).

C. Guardianship Costs

The only remaining issue is whether the Employer is responsible for reimbursing approximately $600.00 paid by Mrs. Sellman to the attorneys who secured the Guardianship Order which made Ms. Sellman the legal guardian of her husband. I.T.O. objects to paying this cost because it was not directly related to the worker's compensation claim.

Section 28 of the Act provides for the award of an attorney's fee to Claimant's attorney upon successful prosecution of a claim. However, an attorney is not

entitled to compensation under the Act for services performed in securing a third party recovery for the Claimant. Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982), aff'd sub nom. Kahny v. Director, OWCP, 729 F.2d 77 (5th Cir. 1984) (table).

Since the Guardianship Order was related to the third-party lawsuit rather than the worker's compensation claim, I find that the Employer is not responsible under the Act for reimbursing these attorney fees.

CONCLUSION

Therefore, based on the entire record in this case, I conclude that the Employer is not entitled to an offset of $250,000.00 against compensation and medical payments under the Act. In addition the Employer is not entitled to terminate future

compensation and medical benefits to the Claimant. However, the Employer is not responsible under the Act for payment of Claimant's guardianship expenses including the attorney fee.

ORDER

In this claim for benefits under the Longshoremen's and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901 et seq., it is hereby ORDERED that the Employer, I.T.O. Corporation of Baltimore, shall pay forthwith:

(1) Permanent total disability payments to Claimant pursuant to Section 8(a) of the Act amounting to 66 2/3 per centum of the Claimant's average weekly wages, or $291.22 per week. The amount of these payments is to be adjusted to reflect the lesser of

the annual percentage increase of the national average weekly wage or 5 per centum per year pursuant to Section 10(f) of the Act. Such payments are to be retroactive to the date those payments were suspended, July 21, 1984.

(2) Medical benefits to Claimant pursuant to Section 7(a) of the Act.

It is further ORDERED that:

(3) The $250,000.00 paid to the Sellmans to compensate for loss of consortium is not subject to statutory offset against compensation and medical benefit payments to Claimant.

(4) The filing of an LS-33 form of written approval is not required

under the facts and circumstances of this case.

(5) Counsel for Claimant may apply for fees in accordance with 20 C.F.R. §702.132 for all services rendered after the last informal conference before the Deputy Commissioner, with service on Employer's counsel within thirty days from receipt of this Decision and Order. Employer may file objections to said applications within thirty days thereafter.

G. MARVIN BOBER
Administrative Law Judge

Dated: June 29, 1987
Washington, D.C.

GMB/at

APPENDIX B

U.S. DEPARTMENT OF LABOR
Benefits Review Board

BRB No. 87-1913

WILLIAM SELLMAN	)
	)
Claimant-Respondent	)
	)
v.	)
	)
I.T.O. CORPORATION OF BALTIMORE	)
	)
Self-Insured Employer-Petitioner	)
	)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)
	)
Party-In-Interest	)

DECISION AND ORDER

Appeal of the Decision and Order of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Paul D. Bekman and Laurence A. Marder (Israelson, Salisbury, Clements & Bekman), Baltimore, Maryland, for self-insured employer.

Rudolph L. Rose and Stan M. Haynes (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

Samuel J. Oshinsky and Joshua T. Gillelan, II (Robert P. Davis, Solicitor of Labor; Carol DeDeo, Associate Solicitor; J. Michael O'Neill, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN and DOLDER, Administrative Appeals Judges, and AMERY, Administrative Law Judge.*

DOLDER, Administrative Appeals Judge:

Employer appeals the Decision and Order (85-LHC-2268) of Administrative Law Judge G. Marvin Bober awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, rational and in accordance with law. 33 U.S.C. §921(b)(3); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(Supp. V 1987).

U.S. 359 (1965). Oral argument was held in this case on March 21, 1990 in Baltimore, Maryland.

Claimant, a longshoreman, fell from a ladder into the hold of a ship, the Algenib, on July 10, 1979. He landed on his head, fracturing his skull.[1] As a result of his injuries, claimant was paralyzed and now requires constant nursing care. He has been hospitalized since the accident. Claimant's wife (Mrs. Sellman) was appointed as his legal guardian in 1982. Employer voluntarily paid temporary total disability compensation and medical benefits from July 11, 1979, to July 17, 1979, and permanent total disability and medical benefits from July 18, 1979, until July 21, 1984. See 33 U.S.C. §§908(a),

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[1] At the time of his injury, claimant was employed by Atlantic and Gulf Stevedores, Incorporated. I.T.O. is the successor to Atlantic and Gulf.

(b), 907. In 1982, employer, claimant, Mrs. Sellman and the Sellmans' children filed a third party suit against, inter alia, the ship on which claimant was injured, its owners and its charterers (the Algenib defendants).[2] In June 1984, the mortgagee of the Algenib began proceedings to foreclose on its mortgage in the Netherlands.[3] This led to expedited settlement negotiations in the third party suit because the ship was about to be

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[2] The suit contained six causes of action by Mr. Sellman (through his personal representative, Mrs. Sellman) for negligence, breach of warranty and strict liability in tort and admiralty; a seventh cause of action by Mr. Sellman and Mrs. Sellman for loss of consortium (Maryland law required that both husband and wife be named as plaintiffs for this cause of action); an eighth cause of action by the Sellmans' children for damage to their filial relationship; and a ninth cause of action by employer for recovery of claimant's medical expenses which were paid by employer. Ex. 8.

[3] Apparently, the mortgage could be foreclosed if the ship became the defendant in a multi-million dollar tort suit, such as that filed by claimant.

impounded and sold at public auction in the Netherlands. Any claim arising out of the third party suit would be subordinate to the mortgage under Dutch law and the value of the mortgage was greater than the value of the ship. After several days of negotiations, the Algenib defendants agreed to pay $250,000 to I.T.O. (the I.T.O. agreement) and $250,000 to the Sellmans (the Sellman agreement). Separate, but companion, settlement agreements were drafted. The two agreements went through several drafts, with the language referring to employer's compensation lien being changed. The final drafts of the agreements were signed on June 18, 1984.

Both agreements state that employer has a compensation lien and that claimant is responsible for satisfaction of the lien in the event of recovery from another party not named in the third party suit. Both

agreements were contingent upon approval of the Sellman agreement by the Baltimore County (Maryland) Circuit Court[4] and upon payment being made on or before July 10, 1984. Claimant's attorney drafted a proposed Petition to Compromise Claim (the Petition) and sent copies to employer's counsel and counsel for the Algenib defendants. After incorporating suggestions made by counsel for the Algenib defendants, the Petition was filed in the Circuit Court. In the Petition, it is stated that employer will continue to pay both compensation and medical benefits and that the proceeds of the Sellman agreement are for Mrs. Sellman's loss of consortium and are not subject to being offset against employer's liability under the Act. Following approval of the Sellman agreement

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[4] This approval was necessitated by the guardianship created for claimant.

by the Circuit Court, the third party suit was dismissed. Employer then refused to sign a Form LS-33 as required by Section 33(g) of the Act, 33 U.S.C. §933(g), and 20 C.F.R. §702.281(b) to approve the Sellman agreement and terminated disability compensation payments to claimant. Employer voluntarily continued to pay medical benefits. On Motion of claimant, the deputy commissioner indefinitely extended the time for claimant to file a Form LS-33.

In the proceedings below, claimant sought restoration of permanent total disability payments and medical benefits, plus reimbursement for the costs of establishing claimant's guardianship. The administrative law judge found that since the two settlement agreements were not fully integrated and since the agreements were ambiguous, the parol evidence rule did

not bar resort to extrinsic evidence to determine the meaning of the agreements. The administrative law judge found that in the negotiations preceding the agreements, the parties had agreed that employer was to continue making payments of compensation and medical benefits. The administrative law judge further found that the terms of the Petition were incorporated into the settlement agreements. In effect, the administrative law judge found that employer had waived its right to offset the proceeds of the Sellman agreement against its compensation and medical benefits liability. See 33 U.S.C. §933(f). The administrative law judge further found that the proceeds of the Sellman agreement were for loss of consortium and, as such, were not subject to offset. The administrative law judge also found that, based on employer's conduct in this case, claimant

was not required to file a Form LS-33 and that Section 33(g) thus did not bar the claim for compensation and medical benefits. See 33 U.S.C. §933(g). Thus, the administrative law judge awarded claimant permanent total disability compensation[5] and medical benefits from the date that employer had terminated its voluntary payments. Finally, the administrative law judge denied claimant's request for reimbursement of guardianship costs.

On appeal, employer contends that claimant's failure to secure approval of its settlement with the Algenib defendants and to file a Form LS-33 cuts off employer's liability for both compensation and medical benefits under Section 33(g) of the Act, 33 U.S.C. §933(g). Alternatively,

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[5] Employer does not challenge the administrative law judge's conclusion that claimant is permanently totally disabled.

employer contends that if it remains liable, it is entitled to offset the proceeds of the Sellman agreement against its liability under Section 33(f), 33 U.S.C. §933(f). Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, argues that Section 33(g) is not applicable in this case; that employer waived its right to an offset under Section 33(f); and that because the proceeds of the Sellman agreement are for loss of consortium, they are not subject to being offset against employer's liability under the Act.

I. Section 33(g)

Employer contends that claimant's failure to obtain approval of the settlement and to file a Form LS-33 cuts

off employer's liability for both medical benefits and compensation. See 33 U.S.C. §933(g)(Supp. V 1987).[6]

A. Medical Benefits

Section 33(g) states, in part:

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner

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[6] As this claim was filed after or pending on September 28, 1984, the effective date of the 1984 Amendments, the amended version of Section 33(f) and (g) applies to this case. Longshore and Harbor Workers' Compensation Act Amendments of 1984, §28(a), Pub. L. No. 98-426, 98 Stat. 1639, 1652, 1655; Chavez v. Todd Shipyards Corp., 21 BRBS 272 (1988).

> within thirty days after the settlement is entered into.
>
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. §933(g)(Supp. V 1987). By its terms, Section 33(g)(1) applies only to employer's liability for disability compensation. Employer cannot be relieved of liability for medical benefits under Section 33(g)(1); liability for medical benefits can be terminated only under Section 33(g)(2). Pinell v. Patterson Service, 22 BRBS 61 (1989(; Mobley v. Bethlehem Steel Corp., 20 BRBS 239 (1988). Section 33(g)(2) provides for the termination of both compensation payments and medical benefits when claimant enters

into a third-party settlement and fails either to obtain employer's written approval or to notify employer of the settlement. 33 (U.S.C. §933(g)(2). In this case, employer was a party to the third-party action, participated in the settlement negotiations, and knew of the Sellman agreement. Thus, the requirement that claimant must notify employer of the settlement has been satisfied and we hold that employer remains liable for the payment of claimant's medical benefits, as the bar contained in Section 33(g)(2) is not applicable. See Pinell, 22 BRBS at 66; see also Picinich v. Lockheed Shipbuilding, 22 BRBS 289 (1989); see also Picinich v. Lockheed Shipbuilding, 22 BRBS 289 (1989).

B. Compensation Payments

Employer also argues that it should be relieved of liability for compensation

payments because claimant failed to secure written approval of the Sellman agreement. Section 33(g)(1) arguably applies in this case because claimant was "a person entitled to compensation" at the time the third-party settlement was entered into. See Dorsey v. Cooper Stevedoring Co., Inc., 18 BRBS 25 (1986). The administrative law judge found that in this case claimant was not required to obtain employer's written approval and to file Form LS-33 because the policy interests implicated in Section 33(g)(1) were protected by employer's participation in the third party action. The administrative law judge also found that strict application of Section 33(g)(1) in the instant case would be harsh and unfair because employer had verbally agreed to execute an LS-33. Employer argues that the administrative law judge impermissibly

created an "equitable" exception to the requirements of Section 33(g)(1).

The Board was confronted with a similar situation to the present case in Pinell, supra. In Pinell, employer intervened in claimant's third-party action, participated in the settlement negotiations, waived part of its lien and recovered the remainder of the lien from the settlement proceeds, but never gave written approval to the settlement and terminated its voluntary payments when the settlement was finalized. The Board held that under the circumstances of that case, employer had given constructive approval of the settlement agreement, satisfying the requirements of Section 33(g)(1). The Board noted that its conclusion served the two interests of employer protected by Section 33(g)(1): namely, the right to recover directly from the third party and the right to offset

claimant's recovery against employer's liability under the Act pursuant to Section 33(f), 33 U.S.C. §933(f). Pinell, 22 BRBS at 65; see also Petroleum Helicopters, Inc. v. Collier, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir. 1986), rev'g 17 BRBS 80 (1985); Cowart v. Nicklos Drilling Co., 23 BRBS 42 (1989). The Board went on to state that Section 33(g) seeks to prevent a claimant from jeopardizing employer's right to offset the proceeds of the settlement against its liability under the Act and is not intended as means for an employer to escape liability. Pinell, 22 BRBS at 66.

Similarly, in this case, employer was a co-plaintiff in claimant's third party action, participated in the settlement negotiations, recovered $250,000.00 directly from the Algenib defendants and thereafter refused to give written approval of the Sellman agreement. The

administrative law judge also found that employer had orally agreed to give written approval of the Sellman agreement.[7] We hold, based on the facts of this case, which are indistinguishable from those in Pinell, that employer gave constructive approval of the Sellman agreement and therefore that the claim for compensation is not barred by Section 33(g)(1) because claimant did not obtain approval and file an LS-33. Moreover, as discussed above, since employer received notice of the settlement, the claim for compensation is also not barred by Section 33(g)(2).

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[7] Employer contends that this finding is not supported by substantial evidence. The administrative law judge relied on the testimony of claimant's third party attorney, Roger Smith, that employer's attorney had verbally agreed to execute an LS-33, see Tr. at 163, 182, 187-188, over the contrary testimony of employer's attorney, see Tr. at 330-335. As the evaluation and weighing of witnesses' testimony is a matter with the administrative law judge's discretion, we reject employer's contention. See Calbeck v. Strachan Shipping Co., 306 F.2d 693 (5th Cir. 1962), cert. denied, 372 U.S. 954 (1963).

The cases cited by employer do not compel a contrary result. The Board's holding in Pinell accords with the policy concerns delineated in Collier. See Cowart v. Nicklos Drilling Co., 23 BRBS 42 (1989). In Nesmith v. Farrell American Station, 19 BRBS 176 (1986), employer did not participate in the settlement negotiations and actively opposed the settlement. Similarly, in Gibson v. I.T.O. Corp. of Ameriport, 18 BRBS 162 (1986), although employer was notified of the settlement negotiations, it was not a party to them and it opposed the settlement agreement. In Dorsey v. Cooper Stevedoring Co., Inc., 18 BRBS 25 (1986), employer intervened in the third party action, but actively opposed the settlement. The Board held that because of the opposition to the settlement, employer had not waived its rights under Section 33(g)(1),

notwithstanding that it knew of the settlement and received part of the settlement proceeds.[8]

Furthermore, we agree with the Director that when an employer is a party to the third-party action and encourages a settlement to which it is also a party, Section 33(g) has no application and cannot bar the claim for compensation under the Act. This result is compelled by the plain language of Section 33(g)(1) that "[i]f the party entitled to compensation" enters into a third-party settlement, employer's approval must be obtained. This language indicates Section 33(g) applies to settlements between claimant and the third party and not, as here, where employer is also a party to the settlement. In cases

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[8] With regard to Devine v. National Creative Growth, Inc. 16 BRBS 147 (1982), the Board effectively adopted Chief Judge Ramsey's dissent from that case in Pinell.

such as this one, where employer is a party plaintiff to the third-party action and thus also has instituted the third-party suit,[9]

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[9] We note that, at the time the third-party suit was filed in 1982, the law in the Fourth Circuit, the jurisdiction in which the third-party suit was filed, was such that when employer was voluntarily paying compensation to the claimant, claimant's rights against third parties were assigned by operation of law to employer under Section 33(b), 33 U.S.C. 933(b)(1982)(amended 1984), after six months. See Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977). Although there is no evidence in the record concerning which party brought the third-party suit, employer was voluntarily paying benefits to claimant at the time the suit was filed. If employer institutes the third-party suit pursuant to Section 33(b) and (d), our holding that Section 33(g) is inapplicable is even more compelling in that the "person entitled to compensation" has not instituted third-party proceedings. In 1983, the Supreme Court held that the lapse of six months after a claimant accepts voluntary compensation does not trigger an assignment to employer under Section 33(b). Pallas Shipping Agency, Ltd. v. Duris, 461 U.S. 529, 15 BRBS 152 (CRT)(1983), aff'g 684 F.2d 352 (6th Cir. 1982). The Supreme Court held that Section 33(b) triggers an assignment of claimant's cause of action only after claimant has accepted compensation under an award in a compensation order issued following proceedings with respect to the claim. See 33 U.S.C. sec. 919(e); Pallas Shipping Agency, 461 U.S. at 535, 15 BRBS at 153 (CRT).

detriment to employer, and employer can act to protect its lien interest during the course of the lawsuit and the settlement negotiations. See Williams v. Halter Marine Service, Inc., 19 BRBS 248 (1987). Where employer is a party to the suit and to the settlement, it would serve no statutory purpose to allow employer to avoid liability for disability benefits by refusing to sign a Form LS-33. Therefore, in this case we affirm the administrative law judge's finding that employer may not terminate compensation payments pursuant to Section 33(g).

II. Section 33(f)

Employer alternatively contends that it is entitled to offset the net recovery from the Sellman agreement against its liability under Section 33(f). The administrative law judge determined that because the terms

of the settlement agreements were ambiguous and because the agreements were not fully integrated (i.e., they required the execution of other documents to take effect), the parol evidence rule did not bar resort to extrinsic evidence to determine the construction of the agreements. The administrative law judge relied on the testimony of the attorney for the Algenib defendants that the parties understood that employer was to continue payment of compensation and medical benefits, and on the terms of the Petition to find that employer had agreed to continue payments to claimant and had waived its right to offset the net proceeds of the Sellman agreement[10] against its liability under the Act. See 33 U.S.C. §933(f). The administrative law judge

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[10] The net recovery under the Sellman agreement was $165,253.20. Employer's Exhibit 27.

further found, based on the Petition, that the proceeds of the Sellman settlement were not subject to offset because they were solely for Mrs. Sellman's loss of consortium. Accordingly, the administrative law judge denied employer any offset against its liability for the net proceeds of the Sellman agreement.

Section 33(f) provides, in part:

> If the person entitled to compensation institutes [a third party action] the employer shall be required to pay as compensation. . . a sum equal to the excess of [its compensation liability] over the net amount recovered [in the third party action].

33 U.S.C. §933(f)(Supp. V 1987). In this case, the I.T.O. agreement states that employer has a compensation lien under the Act and that claimant remains liable for satisfaction of the lien in the event that he obtains a recovery from any party not named as a defendant in the third party action. Employer's Exhibit 15. The

Petition stated that employer remains liable for all compensation and medical benefits so that payment would not be interrupted and that the proceeds of the Sellman agreement are for Mrs. Sellman's loss of consortium. Claimant's Exhibit 3, §§9, 10.

A. Parol Evidence Rule

Employer contends that the administrative law judge erred in relying on extrinsic evidence to determine the construction of the settlement agreements. The administrative law judge found that he could rely on extrinsic evidence to determine the meaning of the lien provision because the terms of the settlement agreements were ambiguous and were not fully integrated.

The parol evidence rule provides that when the parties to a contract put their agreement in writing in a manner so that the terms of the agreement are certain, those terms cannot be varied or contradicted on the basis of extrinsic evidence. 30 Am.Jur.2d Evidence, §1016. There are a number of situations in which the rule is inapplicable. If an agreement is only partially integrated, additional terms which are not inconsistent with the written terms may be established by extrinsic evidence. State v. Cherry Hill and Gravel Co., Inc., 51 Md. App. 299, 443 A.2d 628 (1982); 30 Am.Jur.2d Evidence, §1043. The same is true of a collateral agreement which is consistent with the original agreement. 30 Am.Jur.2d Evidence, §1049. If the terms of the agreement are ambiguous, extrinsic evidence may be used to determine the construction of the terms.

Lambdin v. Dantzebecker, 169 Md. 240, 181 A. 353 (1935); 30 Am.Jur.2d Evidence §1069.

In this case, neither of the agreements state specifically whether employer waived its right to offset the proceeds of the Sellman agreement against its liability under the Act. The provision in the I.T.O. agreement which states that claimant remains liable for the satisfaction of employer's lien in the event that he should recover from another party could reasonably be interpreted as waiving employer's right to offset the proceeds of claimant's recovery from the Algenib defendants. In addition, the terms of the Petition are not necessarily inconsistent with the terms of the settlement agreements. Since the agreements were contingent upon approval of the Sellman agreement by the Circuit Court, the administrative law judge could reasonably find that the settlement

agreements were not fully integrated. Therefore, we hold that substantial evidence supports the administrative law judge's finding that the parol evidence rule does not apply to the settlement agreements and, thus, that he could properly resort to extrinsic evidence to determine the construction of the agreements.

B. Sufficiency of the Evidence

The issue thus becomes whether there is substantial evidence supporting the administrative law judge's conclusion that employer waived its right to an offset under Section 33(f). The administrative law judge based his finding on the testimony of Geoffrey Tobias, attorney for one of the Algenib defendants, and on the terms of the Petition.

Employer contends that the administrative law judge erred in relying on the testimony of Mr. Tobias in finding that the parties understood that employer was to continue payments without interruption. Employer specifically contends that the administrative law judge erred in relying on the testimony because Mr. Tobias testified only to his understanding of the agreements, not employer's understanding. The administrative law judge found Mr. Tobias' testimony the most credible because of his neutrality and because of the detailed nature of his testimony.

Mr. Tobias testified that Roger Smith, claimant's attorney, made clear to him that one of his goals in the settlement negotiations was the continuation of benefit payments. Tr. at 236. Mr. Tobias also testified that his own understanding

from the negotiations was that benefit payments were to continue, and that no contrary understanding was voiced by any participant in the negotiations, including employer's attorney, John Hennegan. Tr. at 263. Mr. Tobias also testified that he saw Mr. Hennegan at a reception in October 1984, at which time Mr. Hennegan agreed with Mr. Tobias' understanding of the settlement agreements, namely that employer was to continue payment of benefits. Tr. at 405-406.

Mr. Tobias' testimony was corroborated by that of Mr. Smith. Mr. Smith testified that Mr. Hennegan was told at a meeting on June 6, 1984, that there could be no settlement unless employer waived its compensation lien. Tr. at 121. Mr. Smith further stated that he changed the language in the original draft of the I.T.O. agreement, Employer's Exhibit 13, which

stated that responsibility for satisfaction of employer's lien remained with claimant and his attorney, to the language used in the final draft, that responsibility remained with claimant only in the event that he recovered from another party not named as a defendant in the third party suit. Tr. at 130-131. He also testified that both employer and its counsel agreed that the lien clause in the I.T.O. agreement meant that employer's lien was fully satisfied by the $250,000 which it received from the Algenib defendants. Tr. at 195; see also Tr. at 184-185.

In contrast, Mr. Hennegan, employer's attorney, stated that he had no recollection of any discussion concerning the continuation of benefits. Tr. 315-316. He further stated that he had no authority to settle the third party suit on behalf of employer and that he did not participate in

the drafting of the settlement agreements. Tr. at 311, 317. According to Mr. Hennegan, Philip Palazzo, the workers' compensation claims manager for employer, handled all negotiations after June 8, 1984. Tr. at 316.[11]

The evaluation of witness testimony is a matter within the administrative law judge's discretion. Calbeck v. Strachan Shipping Co., 306 F.2d 693 (5th Cir. 1962), cert. denied, 372 U.S. 954 (1963). The administrative law judge may weigh the evidence and draw inferences reasonable in light of the entire record. See Sprague v. Director, OWCP, 688 F.2d 862 (1st Cir. 1982). Thus, the administrative law judge could rationally give greater weight to the testimony of Mr. Tobias based on his

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[11] This testimony was contradicted by Palazzo. See Tr. at 436, 443. Palazzo did state that his understanding was that employer was to offset the proceeds of the Sellman agreement against compensation liability. Tr. at 434.

neutrality and on the detailed nature of his testimony. Moreover, the change in the language of the lien provision of the I.T.O. agreement from that of its original draft to that of its final form supports the administrative law judge's interpretation of Mr. Tobias' testimony (i.e., that employer waived its right to an offset). Hence, we affirm the administrative law judge's reliance on Mr. Tobias' testimony to support a finding that employer waived its offset under Section 33(f).

Employer also contends that the administrative law judge erred in relying on the terms of the Petition. The administrative law judge found that the terms of the Petition were incorporated into the settlement agreements because both agreements were contingent upon court approval of the Sellman agreement. The

administrative law judge also found that employer was estopped from attacking the Petition because it remained silent when the Petition was drafted and filed.

The Petition was filed in the Circuit Court of Baltimore County and, although no hearing was held, the court issued an order approving the Sellman agreement based upon the Petition. Paragraph 9 of the Petition provides that employer is to continue compensation payments without interruption. The Petition was drafted by Mr. Smith, who sent copies to both Mr. Tobias and Mr. Hennegan. See Claimant's Exhibit 9. Mr. Tobias made suggestions for changes, id., but Mr. Hennegan did not respond. Mr. Smith incorporated Mr. Tobias' suggestions and filed the Petition, again sending copies to Mr. Tobias and Mr. Hennegan. See Claimant's Exhibit 10. Again, Mr. Hennegan did not respond. After the Court issued

its order approving the Sellman agreement, Mr. Smith sent copies of the signed Petition and Order to Mr. Tobias and Mr. Hennegan. See Claimant's Exhibit 11. Mr. Hennegan did not respond.

Mr. Tobias testified that the Sellman agreement was submitted for court approval at his insistence and that he considered the Petition and Order approving the Sellman agreement to be "part and parcel" of the settlement agreements. Tr. at 245-246, 252, 286. This testimony was corroborated by Mr. Smith and credited by the administrative law judge. See Tr. at 140. Mr. Hennegan, although he received copies of various drafts of the Petition, stated that he was not concerned with its contents because employer was not a party to it. Tr. at 381.

Since both settlement agreements were contingent on court approval of the Sellman

agreement and since the terms of the Petition were not necessarily inconsistent with the terms of the settlement agreements, the administrative law judge could rationally find that the terms of the Petition were incorporated into the settlement agreements, especially when employer did not object to the terms of the Petition when it had the opportunity to do so. As the administrative law judge rationally relied on the testimony of Mr. Tobias and rationally found the terms of the Petition incorporated into the settlement agreements, substantial evidence supports his finding that employer waived its lien under Section 33(f). See ITO Corp. v. Director, OWCP, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989). We, therefore, must affirm his conclusion that employer may not offset the net proceeds of

the Sellman agreement against its liability under the Act.[12]

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

I concur:

ROBERT S. AMERY
Administrative Law Judge

BROWN, Administrative Appeals Judge, concurring and dissenting:

The facts of this case are summarized in the majority's opinion. Based upon

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[12] Given our disposition of this issue, we need not address the Director's contention that because the proceeds of the Sellman agreement are for loss of consortium, they are not subject to being offset against employer's compensation liability.

these facts, there are two main issues. First, may the employer terminate all further payments of compensation after the settlement of the third party action due to claimant's alleged failure to obtain approval from employer or to give notice to employer of the proposed settlement in accordance with Section 33(g) of the Act, 33 U.S.C. §933(g). The second, may the employer take credit for and offset against its future compensation liability the net amount recovered by claimant in settlement of the third party action pursuant to Section 33(f) of the Act, 33 U.S.C. §933(f). I concur with my colleagues in affirming the administrative law judge's finding that employer may not terminate compensation payments pursuant to Section 33(g). I concur essentially on the analysis and the rationale set forth in the

majority's opinion relating to the Section 33(g) issue.

Section 33 of the Act provides, in effect, that if an employee to whom compensation is payable, was injured as the result of negligence of a third party, an action for damages may be instituted against the third party. Under some circumstances, the action may be instituted by employer to recover its expenses, cost of compensation paid and cost of medical benefits. The balance of the recovery shall be paid to the injured employee. For obvious reasons the written approval and notice requirements of Section 33(g) are not applicable when employer institutes the suit and negotiates a settlement.

When the injured employee brings the third party suit, Section 33(g) comes into play. If the employee enters into a settlement for an amount less than the

compensation to which he would be entitled, the employer is liable for continued compensation over and above the employee's net recovery only if written approval of the settlement is obtained from employer prior to execution of the settlement. Section 33(g)(2), when applicable, provides that if written approval is not obtained, or the injured employee fails to notify employer of the settlement or judgment, all rights to compensation and medical benefits are terminated.

Section 33 provides that when the injured employee institutes the third party suit, the approval and notice requirements of Section 33(g) are applicable. If employer institutes the suit, there are no approval or notice requirements. But strangely, nothing is provided in Section 33 about approval or notice when both employer and injured employee initiate the

suit together, as in this case, or when both are in the suit as a result of intervention or joinder. Here, as discussed by the majority, both parties initiated the suit, participated in all phases of the litigation, participated in the settlement negotiations and entered into settlements that were so intermeshed that they could be considered a joint settlement. In fact, the employer's settlement agreement with the third party stipulated that it was contingent upon the companion Sellman settlement with the third party for $250,000.00 being approved by the Circuit Court of Baltimore County. This agreement was signed by four people, employer's attorney, third party's attorney, the Sellmans' attorney, and Mrs. Sellman. Written and signed approval of the basic settlements was unequivocally expressed. Although there was discussion

about the execution of an LS-33, the official form for the approval by an employer of a settlement, and although there was an alleged promise to sign one, and then an actual refusal, the execution of an LS-33 was not required. It was superfluous in view of the signed agreement. It is interesting to note further that in the testimony of Philip Palazzo, employer's Workers' Compensation Claims Manager, he stated, "we were consenting to the settlement, but we would be entitled to an offset . . ! ." Tr. at 434. Under the circumstances of this case, technical written approval of the settlement on a LS-33 was not required and employer is not entitled to terminate compensation payments. To this extent, I concur with my colleagues.

I respectfully dissent, however, from the majority's decision to affirm the

administrative law judge on the Section 33(f) issue in denying employer the right to offset against its future compensation liability the net recovery made by employer in settlement of the third party suit. The net recovery on the part of the Sellmans (husband, wife and two children) out of the agreed $250,000.00 was $165,253.20. Employer asserts that it is entitled to offset this amount. Employee's attorney contested this contention and the administrative law judge denied employer's right to an offset, contending that employer had waived its right.

There are two propositions that should be borne in mind before discussing employer's right to an offset under Section 33(f). First, when the third party suit was settled on June 18, 1984, and approved by the Court on July 2, 1984, the employer had the right to recover its lien for

compensation paid and medical benefits provided. Since this was at least $525,000 as of the time of settlement, employer could have insisted on the full amount being offered to both the Sellmans and employer. This right would be a first lien on the proceeds, even prior to a claim for an attorney's fee by the attorney for the Sellmans. See Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980). Despite this legal right, the parties obviously entered into a compromise with $250,000 going to the Sellmans and $250,000 going to employer. The net recovery of the Sellmans, as indicated above, after deduction of attorney fees and costs, was $165,253.20.

The next proposition to be recognized is that at this point, under Section 33(f), the employer had the right to offset against its future compensation liability

the full amount of the Sellmans' net recovery. This is a right that arose as a matter of law. It is a right that should have been recognized by all the parties. Here, however, is where the confusion sets in. Employee's attorney expressed the thought that payments were to continue but cannot point to anything specific to come to this conclusion other than the settlement agreements. He thought this was the understanding of employer's workers' compensation manager. He concluded this due to the wording that the $250,000.00 received by employer was for its lien in full. Tr. at 184. But that's the rub. The lien has to do with the lien. That covered employer's settlement; it had nothing to do with offset rights under the Sellmans' recovery. He conceded that suspension of benefits was never discussed with employer's representatives. Tr. at

185. He further admitted that suspension of benefits was never discussed with employer's attorney as well. Tr. at 185. Employer's attorney said he had no notes or recollection of continuation of benefits and no request to employer that compensation not be suspended. Tr. at 315. The attorney for the shipowner also testified that it was his impression that in the settlements the Sellmans would get $250,000.00 and employer get $250,000.00 and the compensation payments would continue. He said, "that's what I understood the agreement to be." Tr. at 263. His basis was solely on the settlement agreements. Much was made of a conversation between the attorney for employer and attorney for the shipowner at a cocktail party. The administrative law judge seems to use this as a basis for concluding that there was an agreement that

compensation was to continue. On page 11 of his decision and order he quotes testimony of the shipowner's attorney that employer's attorney agreed with him as to his understanding that the settlement was to be $250,000.00 free and clear to the Sellmans and $250,000.00 period free and clear to employer, citing Tr. at 421. However, no mention was made by the administrative law judge of the testimony of shipowner's attorney at Tr. 408 that "Mr. Hennegan never said anything to me about the continuation of the compensation payments." Apparently, that always came from employer's attorney. Tr. at 408. Again at Tr. at 413, in an attempt to correct any confusion, shipowner's attorney said, "I do not think the words continuation of compensation payments were mentioned by either of us and if, and I think I may have suggested that (earlier in

his testimony), that if those words were expressed in the conversation, they certainly were not." (emphasis added). As I see it, there was a lot of needless confusion and misconception on the part of a lot of people. But, as I stated earlier, we start with the proposition that under Section 33(f) the employer had the right, as a matter of law, to offset $165,253.20 from its future compensation liability. There is nothing in the record to indicate that employer ever waived that right, affirmatively or otherwise. The administrative law judge based his conclusion in large part on the testimony of shipowner's attorney. However, it is clear he misconstrued what was said or what was not said. His conclusion therefore must fall. It was not based on substantial evidence.

It is time to analyze the settlement documents, starting with the separate settlement agreements between the Sellmans and the Algenib, et. al. and employer and the Algenib, et al. Both recite the fact that the Sellmans (employee, his wife and two children) and employer instituted suit against the Algenib, et al, as a result of an accident involving employee on the vessel on July 10, 1979. Nine causes of action were listed in the complaint. It was agreed in the Sellman settlement that the Sellmans would release all causes of action they had upon payment of $250,000. It was stipulated in the Sellman agreement that this "Settlement Agreement" would be null and void unless the companion settlement agreement was approved by the aforesaid court. These documents were signed on June 18, 1984. Clearly at that

point they constituted the sole understanding between the parties.

Ten days later, on June 28, 1984, the Petition to Compromise Claim was prepared. Paragraph 7 recited the basic facts of the Sellman - Algenib settlement agreement, a copy of which was attached as Exhibit A. The petition concluded with the request that the court issue an order authorizing Mrs. Sellman and her attorney to accept the aforesaid settlement, i.e., the basic Sellman - Algenib settlement agreement. On July 2, 1984, the court issued its order authorizing the Sellmans to accept the $250,000 in full settlement of all claims of William H. Sellman, Jr., in accordance with the settlement agreements. Again this is a reference to the basic settlement agreements. As I see it, the terms of the basic Sellman - Algenib agreement were approved, nothing more, nothing less.

Much confusion has developed as a result of the assertion in paragraph 9. of the Petition to Compromise Claim to the effect that benefits will not be interrupted and will continue, as well as the assertion in paragraph 10, that Mrs. Sellman, individually, and on behalf of the two children, under the loss of consortium claims, have settled for $250,000. It is clear that neither of these assertions is contained in the basic settlement agreements and they are not contained in the agreement attached as Exhibit A and they are not a part of the settlement agreement approved by the Court. As I see it, these assertions are similar to averments made in a complaint. They are not evidence and, as all averments in a complaint, must be proved. Otherwise they fall by the wayside. As I indicated in my discussion above, there is nothing in the

record to conclude that employer waived its right of offset. There is nothing in the record to indicate that employer agreed that the Sellman settlement funds could all be earmarked for loss of consortium and, therefore, not subject to subrogation.[1]

The administrative law judge held that the Petition to Compromise augmented the basic settlement agreements. I would hold this to be an error of law. Although a copy of the Petition to Compromise was forwarded to employer's attorney, and no comment was ever made, there was no duty to do so. Employer was not a party to the Baltimore Court proceedings. Its sole interest was that the basic Sellman-Algenib settlement agreement be approved and, in fact, it was that basic agreement

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[1] If the proceeds were for loss of consortium, a waiver would not be required. Vice versa, if employer waived its right to offset, why the attempt to relate the proceeds to loss of consortium?

that was approved. Nothing was contained in the basic agreements about continuation of payments or loss of consortium. The basic agreement referred to the suit on file, which had nine causes of action and that payment was being made to or on behalf of all of the Sellmans for all of their causes of action. Since Mrs. Sellman was appointed as the guardian of her husband, there would appear to be a conflict of interests to attempt to allocate all of the funds to her for loss of consortium rather than break them down to all the Sellman plaintiffs especially considering the serious injuries sustained by the employee. One would expect that the bulk of a settlement or a judgment in a case such as this would be allocated based upon the injuries, pain and suffering.

One last point. The administrative law judge in his opinion and employee's counsel

at oral argument indicated, in effect, that the third party suit would be futile, meaningless and of no benefit unless it was understood that the employer would continue to pay compensation to employee and waive a right to offset employee's net recovery. The inference is that employee gained nothing if employer is allowed to take credit. Employee's net recovery was $165,253.20. This was received in a lump sum. At 8.5 percent interest, somewhat standard today, this would produce an income of $14,046 annually or $270 per week. Since the compensation rate was $291.22 per week, employee is roughly in the same position as far as weekly income is concerned, but also has the capital. Once the period for offset has elapsed, the compensation payments would be reinstated.

For the reason set forth above I would reverse the administrative law judge on the

Section 33(f) issue and would allow the employer the right to suspend the payment of compensation benefits until employee's net third party recovery is offset.

JAMES F. BROWN
Administrative Appeals Judge

Dated this 31st day
of July 1990

APPENDIX C

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

I.T.O. CORPORATION OF BALTIMORE,

Petitioner

v.

WILLIAM SELLMAN; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

No. 90-1531

Respondents.

On Petition for Review of an Order of the Benefits Review Board (No. 87-1913)

Argued: April 10, 1991

Decided: January 22, 1992

Before RUSSELL, Circuit Judge, CHAPMAN, Senior Circuit Judge, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part and reversed in part by published opinion. Judge Russell wrote the

published opinion. Judge Russell wrote the opinion, in which Senior Judge Chapman and Judge Williams joined.

COUNSEL

ARGUED: Stan Musial Haynes, Rudolph Lee Rose, SEMMES, BOWEN & SEMMES, Baltimore, Maryland, for Petitione. Joshua T. Gillelan, II, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Respondent Director; Paul David Bekman, ISRAELSON, SALSBURY, CLEMENTS & BEKMAN, Baltimore, Maryland, for Respondent Sellman. **ON BRIEF:** Robert P. Davis, Solicitor of Labor, Carol A. De Deo, Associate Solicitor, Janet R. Dunlop, Counsel for Longshore, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, WASHINGTON, D.C., for Respondent Director; Laurence A. Marder, ISRAELSON, SALSBURY, CLEMENTS & BEKMAN, Baltimore, Maryland, for Respondent Sellman.

OPINION

RUSSELL, Circuit Judge:

This case arises out of a claim filed under the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. §§ 901-950 (1986). Employer, I.T.O. Corporation of Baltimore ("I.T.O."), appeals from a decision of the Benefits Review Board ("Board") affirming an administrative law judge's (ALJ) decision denying I.T.O.'s request to terminate compensation and medical benefit payments or, alternatively, to offset its liability against settlement proceeds received by the claimant, William Sellman, through a third-party settlement agreement. We agree with the Board that I.T.O. may not terminate benefit payments, but reverse its determination that I.T.O. is not entitled to an offset.

There is no dispute in this case concerning William Sellman's disability

status. Sellman suffered a fall on July 10, 1979, while working on a ship known as the Algenib for I.T.O.'s predecessor, resulting in a fractured skull and paralysis. I.T.O. voluntarily paid compensation and medical benefits for total disability from July 11, 1979, until July 21, 1984. I.T.O. refused to make further payments after this date because Sellman refused to transfer to I.T.O. funds he received from a settlement of his third-party suit against the owners of the Algenib.

I.T.O., Sellman, and his wife[1] and children filed suit against the Algenib defendants in 1982 which culminated in two settlement agreements executed in June 1984. One agreement ("I.T.O. agreement") called for the payment of $250,000 to

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[1] Sellman's wife was appointed as his legal guardian in 1982.

I.T.O. The agreement provided that it would have "no force and effect" until "the companion Settlement Agreement of the Sellmans is approved by the Circuit Court for Baltimore County. . . ." The I.T.O. agreement was signed by Mrs. Sellman, William's attorney, and the attorneys for I.T.O. and the Algenib defendants.

The second agreement ("Sellman agreement") required the Algenib defendants to pay $250,000 to the Sellmans in satisfaction of any claims against them. The Sellmans had filed nine causes of action against the Algenib, including one cause of action for loss of consortium. The Sellman agreement was signed by Mrs. Sellman, the Sellmans' attorney, Roger Smith, and the attorney for the Algenib defendants, Geoffrey Tobias. Like the I.T.O. agreement, the Sellman agreement was contingent upon approval by the Baltimore

Circuit Court. Both agreements referenced I.T.O.'s alleged compensation lien. At the time the settlements were reached, I.T.O. had a lien of over one-half million dollars, which was growing at a rate of over $100,000 a year.

The provision requiring approval by the circuit court was requested by the ship owners, because Mr. Sellman was under guardianship protection and the Baltimore County Circuit Court was the court which had approved Mrs. Sellman as Mr. Sellman's legal guardian. Pursuant to this requirement of the settlement agreements, Mr. Smith drafted a Petition to Compromise Claim for submission to the Baltimore County Circuit Court. The Petition was drafted after the settlement agreements were executed and contained provisions which differed significantly from the provisions of the settlement agreements.

Whereas the settlement agreements were silent as to whether I.T.O. had the right to suspend compensation payments, or to receive an offset against the proceeds of the Sellman settlement, the petition stated that I.T.O. had agreed to continue compensation and medical payments without interruption and that none of the proceeds of the Sellman agreement were subject to offset because they were intended solely to compensate Mrs. Sellman for loss of consortium. The petition submitted to the Baltimore County Circuit Court resulted in approval of the Sellman agreement.

In finding that I.T.O. was required to continue making both compensation and medical payments, the ALJ found that the petition was incorporated into the settlement agreements, and relied on this document and testamentary evidence to find that the parties in fact intended that

I.T.O. continue making payments without interruption. The ALJ further found that the circumstances of this case obviated Mr. Sellman's responsibility under 33 U.S.C. §933(g) to file a government form known as Form LS-33 reflecting I.T.O.'s written approval of its third-party settlement agreement. Finally, the ALJ determined that the proceeds of the Sellman agreement were for loss of consortium and thus not subject to offset.

The Board unanimously upheld the ALJ's determination that I.T.O. was not entitled to terminate benefit payments. The Board reasoned that the requirement of section 33(g) that a claimant obtain employer's written approval of any settlement claimant reached with a third party was inapplicable where, as in this case, employer was both a party to the third-party suit and helped negotiate the settlement reached between

claimant and the third-party. The Board noted that, in any event, I.T.O. would have no right to terminate medical benefit payments because the statute only permitted termination of medical benefits where claimant failed to either obtain employer's written approval of the settlement or notify employer of the settlement, and there was no question that I.T.O. received notice of the Sellman agreement.

A majority of the Board also affirmed the ALJ's finding that I.T.O. was not entitled to offset the proceeds of the Sellman agreement against its liability under the Act. The majority found that since the settlement agreements were ambiguous as to whether I.T.O. had waived its statutory right to an offset, the ALJ properly relied on extrinsic evidence to determine the intentions of the parties and that substantial evidence supported his

findings regarding the intentions of the parties.

One Board member dissented from the majority's determination regarding the offset issue. The dissenting Board member felt that I.T.O. had the right to either collect the entire $500,000 paid by the Algenib defendants immediately or to receive a credit against its future liability by suspending payments until its full offset was realized. The dissent also took the position that the petition to compromise claim was a separate document from the settlement agreements whose only purpose was to request the circuit court to approve the Sellman agreement, and that the circuit court's order did not approve the petition, but the Sellman agreement. Finally, the dissent argued that the ALJ's findings regarding the intention of the parties were not supported by substantial

evidence because the ALJ had misconstrued relevant testimony.

Under 33 U.S.C. §933(a), an employee entitled to compensation under the Act need not elect to pursue his worker's compensation claim to the exclusion of a negligence action against a third party. If, however, recovery is obtained from the third party, employer is entitled to offset its liability under the Act against such recovery pursuant to 33 U.S.C. §933(f). Section 33(g), 33 U.S.C. §933(g), deals with situations where the claimant settles his third-party action. That section provides, in pertinent part:

> If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f)

> only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1).

Subsection 2 of section 33(g) states the consequences for failing to obtain the employer's written approval:

> If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. §933(g)(2).

In this appeal, I.T.O. argues that the Board erred by ignoring the plain language

of the statute and pertinent case law in denying I.T.O. the right to terminate benefits. I.T.O. argues that since Mr. Sellman did not obtain I.T.O.'s written approval of the Sellman agreement and indisputably failed to file the required LS-33 form in a timely manner, the statute requires that benefit payments terminate. I.T.O. further contends that the Board erred by finding that its participation in the third-party action and settlement negotiations rendered section 33(g) inapplicable, relying on case authorities holding that section 33(g)'s written approval requirement is to be strictly enforced without exceptions. I.T.O. further relies on case authorities holding that the legislative history underlying the addition of subsection (2) and its termination provisions to section 33(g) indicate that its purpose was to preclude

debate over whether an employer's conduct amounted to the equivalent of written approval and thus estopped it from denying that it had given written approval.

We find these arguments unpersuasive. The purpose of section 33(g) is to protect employer "against his employee accepting too little for his cause of action against a third party." Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459, 467 (1968); Robinson Terminal Warehouse Corp. v. Adler, 440 F.2d 1060, 1062 (4th Cir. 1971). In other words, the written approval requirement prevents the claimant from acting unilaterally to the detriment of the employer by accepting less in settlement than it might be entitled to and thus reducing employer's offset.

We agree with claimant and the Board that the purposes of section 33(g) would be ill served by permitting the termination of

benefits where employer has directly insured, by its own actions, the protection of its offset rights. In this case, I.T.O. directly participated in the third-party action against the Algenib defendants, and fully participated in the negotiations leading to the execution of "companion" settlement agreements which, as the Board stated, "were so intermeshed that they could be considered a joint settlement." After all this, and after accepting the settlement proceeds from the I.T.O. agreement, I.T.O. refused to give its written approval of the Sellman agreement.

Our holding that employer may not terminate benefit payments is not grounded in the view that employer is estopped to deny that it gave written approval in this case. Rather, employer's conduct in this case rendered section 33(g) inapplicable. The language of the statute supports this

construction. Section 33(g) contemplates a situation where "the person entitled to compensation" reaches a settlement with a third party. This language reflects the concern alluded to earlier over unilateral action which is detrimental to the employer. Conspicuously, the statute contains no reference to written approval or notice requirements where the employer participates in the settlements.[2] Accordingly, we conclude that written approval is unnecessary under such circumstances.

We next address whether I.T.O. is entitled to an offset under section 33(f). The Board determined that a provision in the I.T.O. agreement stating that

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[2] We also agree with the Board that I.T.O.'s reliance on cases where the written approval requirement was upheld despite employer's participation in the third-party suit is misplaced since, in those cases, employer opposed the settlement.

responsibility for satisfaction of I.T.O.'s lien "remains with Mr. Sellman in the event that there is any recovery of any sums of money from any other party not named as a Defendant herein" could reasonably be interpreted as waiving I.T.O.'s right to offset the proceeds of Mr. Sellman's settlement with the Algenib defendants. The Board majority therefore concluded that the contract was ambiguous as to whether I.T.O. intended to waive its right to an offset, justifying circumvention of the parol evidence rule and permitting examination of extrinsic evidence, namely, the petition and the testimony of the attorneys involved in the case, to determine the intention of the parties. Even if we agreed with the Board's conclusion that the provision in the I.T.O. agreement was ambiguous, we find that the petition and relevant testimony do not

support the conclusion that I.T.O. intended to waive its lien.

Initially, we agree with the dissenting Board member that the ALJ committed legal error in finding that the petition augmented the I.T.O. and Sellman agreements. The purpose of the petition was to obtain court approval of the Sellman agreement, and review of the petition and the circuit court's order discloses that this was the only result achieved. Paragraph 7 of the petition informed the court that the Algenib defendants, "in settlement of all claims of William H. Sellman, Jr.," offered a sum of $250,000. Paragraph 9 states that I.T.O. agreed to accept $250,000 in settlement of its claims against the Algenib defendants, and that I.T.O. will remain liable for all indemnity so that benefits "will not be interrupted." Paragraph 10 provides: "Rhoda Sellman,

individually and on behalf of her minor children . . . under the loss of consortium claims . . . have also been negotiated and settled for the sum of [$250,000], separate and apart from these proceedings" (emphasis added).

The circuit court's order makes no reference to the matters contained in paragraphs 9 or 10. Rather, the court's order merely authorizes Mrs. Sellman and her attorneys to accept the $250,000 offer of the Algenib defendants "in full settlement of all claims of William H. Sellman" arising out of his injuries on the ship. Thus, the court's order reflects the fact that the court had no reason or authority to approve paragraphs 9 and 10 of the petition. Moreover, we find it particularly unlikely that the court would have approved paragraph 10, since it referred to an agreement which does not

appear to exist and since, in any event, the petition states that Rhoda's alleged settlement was "separate and apart from these proceedings.[3]

Once paragraphs 9 and 10 of the petition are removed from consideration, there is no documentary evidence indicating that I.T.O. intended to waive its right to an offset. In finding that I.T.O. intended to waive its lien, however, the ALJ also relied heavily on testimony by Mr. Tobias to the effect that the parties intended that benefit payments to Mr. Sellman would continue, despite the Sellman settlement, without interruption. The majority of the Board found that the ALJ acted within his discretion in determining which

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[3] We also reject William's contention that I.T.O. ought to be bound by the terms of the petition because it never objected to its provisions despite being sent a copy. I.T.O. was not a party to the guardianship proceeding before the circuit court, and had no duty to object to the contents of the petition.

testamentary evidence to credit. We agree, however, with the dissenting Board member that the ALJ misconstrued the testimony of Mr. Tobias.

Mr. Tobias testified that it was his understanding that under the agreements benefit payments were to continue, and mentioned at one point in his testimony that in a discussion with Mr. Hennegan, I.T.O.'s attorney, at a cocktail party in October 1984, Hennegan agreed with him as to his understanding on this point. As pointed out by the dissent, Mr. Tobias later corrected his statement, testifying that "I do not think the words continuation of compensation payments were mentioned by either of us and if, I think I may have suggested that, that if those words were expressed in the conversation, they certainly were not." Mr. Tobias further testified, more generally, that Mr.

Hennegan never said anything to him about the continuation of payments. Even Sellman's attorney, Mr. Smith, conceded that the suspension of benefits was never discussed with I.T.O.'s representatives.

We note the Director's position that I.T.O. cannot recover its offset because at least some portion of the Sellman settlement proceeds must have been for loss of consortium by virtue of the fact that Mr. Sellman's family members were parties to the agreement, and I.T.O. failed to prove what portion of the proceeds were solely for William. We disagree. The Sellmans brought nine different causes of action against the Algenib defendants, only one of which was for loss of consortium. Since the Sellman agreement makes no attempt to match specific portions of the proceeds with specific causes of action, there is no way to determine what, if any,

portion of the settlement was for loss of consortium. The Board has specifically upheld the employer's right to a total offset unless the settlement agreement specifically apportions the amounts intended for the claimant and the amounts intended for family members. See Force v. Kaiser Aluminum & Chemical Corp., 23 BRBS 1 (1989). To accept the Director's position would require this Court to rewrite the Sellman agreement, which we cannot do. See Kasten Constr. Co., Inc. v. Rod Enters., Inc., 301 A.2d 12 (Md. 1973). See also Automatic Retailers of Am., Inc. v. Evans Cigarette Serv. Co., 304 A.2d 581 (Md. 1973).

The Director also contends that I.T.O. is barred from recovering an offset because it indisputably waived its "lien" when it chose not to enforce its right to have the $250,000 in proceeds from the Sellman

agreement transferred directly to itself. Instead, I.T.O. agreed to allow the funds to go to the Sellmans and simply ceased payments until its retained payments equaled the net value of the settlement. The Director avers that the lien waiver is rendered illusory if it is held that I.T.O. waived its lien, but did not waive its right to a credit for the very amount it could have collected immediately.

Section 33(f) provides no basis for treating employer's right to an offset differently depending on the amount of time it takes to collect it. Moreover, an employer's decision to suspend benefit payments until it exhausts its credit provides claimants incentive to enter into a third-party settlement. By exercising its right to offset in this manner, employers allow the claimant to receive a large lump sum immediately rather than have

the same funds disbursed to him in smaller increments over a period of time. This permits the claimant to use some of the funds to produce further income.

In cases where the claimant's third-party recovery exceeds employer's liability at the time of the recovery, the employer ceases benefit payments until such time as the claimant's continuing medical expenses exceed the amount of the third-party recover. See Shoemaker v. Schiavone and Sons, Inc., 20 BRBS 214 (1988). The only factor which distinguishes this case from those cases is that here I.T.O. could have collected the entire $250,000 immediately because the amount of its liability was known. We see no reason to penalize an employer for voluntarily collecting its offset over a period of time. Such a practice aids employers by encouraging claimants to pursue third-party recoveries,

and aids claimants by permitting them to receive a lump sum which may be utilized to produce further income.

Accordingly, the decision of the Board is affirmed in part and reversed in part. I.T.O. may not terminate either compensation or medical benefit payments, but is entitled to offset its liability against William's third-party settlement recovery.

AFFIRMED IN PART AND REVERSED IN PART

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
February 27, 1992

No. 90-1531
87-1913

I.T.O. CORPORATION OF BALTIMORE

Petitioner

v.

WILLIAM SELLMAN; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents

ORDER

Petitioner has filed a request for leave to file an answer to the petition for rehearing and suggestion for rehearing in banc.

The Court denies the request.

FOR THE COURT - BY DIRECTION

JOHN M. GREACEN
CLERK

APPENDIX E

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

I.T.O. CORPORATION OF BALTIMORE,

Petitioner,

v.

WILLIAM SELLMAN; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

No. 90-1531

Respondents.

On Petition for Rehearing and Suggestion for Rehearing En Banc

April 10, 1991

Decided: June 17, 1992*

Before RUSSELL, Circuit Judge, CHAPMAN, Senior Circuit Judge, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

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* This opinion supplements the Court's opinion of January 22, 1992.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Russell wrote the opinion, in which Senior Judge Chapman and Judge Williams joined.

COUNSEL

ARGUED: Stan Musial Haynes, Rudolph Lee Rose, SEMMES, BOWEN & SEMMES, Baltimore, Maryland, for Petitioner. Joshua T. Gillelan, II, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Respondent Director; Paul David Bekman, ISRAELSON, SALSBURY, CLEMENTS & BEKMAN, Baltimore, Maryland, for Respondent Sellman. **ON BRIEF:** Robert P. Davis, Solicitor of Labor, Carol A. De Deo, Associate Solicitor, Janet R. Dunlop, DEPARTMENT OF LABOR, WASHINGTON, D.C., for Respondent Director; Laurence A. Mardner, ISRAELSON, SALSBURY, CLEMENTS & BEKMAN, Baltimore, Maryland, for Respondent Sellman.

OPINION

RUSSELL, Circuit Judge:

The Director, Office of Workers' Compensation Programs, ("Director") has filed a petition for rehearing and suggestion for rehearing en banc, seeking reconsideration of our recent opinion in this appeal. The relevant facts are fully discussed in our primary opinion. Briefly, the case involved a claim for benefits filed under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901-950 (1988), for serious injuries sustained by William Sellman. I.T.O. did not dispute its liability to Mr. Sellman for compensation and medical benefit payments as a result of his injuries. For approximately five years, I.T.O. voluntarily made such payments.

One of the critical issues before us on the initial appeal was whether I.T.O. properly ceased benefit payments because Sellman and his family failed to obtain I.T.O.'s written approval of their settlement agreement with a third party. We found that I.T.O. was not entitled to terminate payments, and thus addressed whether I.T.O. was entitled to an offset, pursuant to 33 U.S.C. § 933(f). Claimant and the Director argued that I.T.O. could not recover its offset because at least some portion of the Sellman settlement proceeds must have been intended for William's wife and children, since they were parties to the agreement. In rejecting this argument, we noted that the settlement contract was silent regarding apportionment. We relied on the Board's decision in Force v. Kaiser Aluminum & Chemical Corp., 23 B.R.B. 1 (1989), which

held that unless the settlement contract specifically apportions liability between the claimant and his family members, the employer is entitled to a total offset.

The Director's petition for rehearing points out that the Board's decision in Force was recently reversed by the Ninth Circuit in Force v. Director, Office of Workers' Compensation Programs, 938 F.2d 981 (9th Cir. 1991). In that case, the Ninth Circuit implicitly rejected the Board's view that where the settlement contract is silent regarding apportionment, it would be too speculative to attempt to make a factual determination regarding the intentions of the parties. The court acknowledged the difficult proof problems associated with this issue, but found that there were objective factors, such as how the settlement sum was actually distributed among family members and the going rate for

settlements or judgments for identical injuries, which the ALJ could examine in order to reach a conclusion without engaging in pure speculation. Force, 938 F.2d at 985-86.

Upon reconsideration, we adopt the view of the Ninth Circuit and find that employers are not automatically entitled to a full offset whenever the settlement agreement at issue fails to address the subject of apportionment. Rather, the ALJ should, under such circumstances, determine the portion intended for the claimant and the portion intended for family members. Employer's offset rights are limited to the portion intended for the claimant, since the claimant is the "person entitled to compensation." See 33 U.S.C. § 933(f).

We also agree with the Ninth Circuit view that employers should bear the burden of proof on the apportionment issue. While

the Longshore Act does not address this issue, we note that employer's liability continues under the Act unless claimant receives compensation from a third party. Force, 938 F.2d at 985. Thus, the employer is most similarly situated to a plaintiff in this circumstance. We therefore conclude that it is both logical and consistent with the Act to impose the burden of proof upon the employer.

We note that the record already contains some evidence, both documentary and testamentary in character, relevant to the apportionment issue. Nonetheless, because I.T.O. did not have the benefit of our holding that it should bear the burden of proof on the apportionment issue at the hearing before the ALJ, the ALJ may wish to reopen the record and admit further evidence relating to this issue. See Force, 938 F.2d at 986.

Finally, we note that our earlier opinion contains some discussion regarding the inferences which could fairly be drawn from some of the evidence of record. We reject the Director's contention that we intruded upon the province of the ALJ in concluding that he committed errors in weighing such evidence. Contrary to the Director's arguments, our findings did not require us to make any credibility determinations or to reweigh the evidence of record. Rather, within the scope of our review, we determined that some of the ALJ's conclusions were not supported by substantial evidence.

Accordingly, we vacate that portion of our earlier opinion which found I.T.O. entitled to offset its liability against the proceeds of the Sellman settlement agreement, and remand for further proceedings consistent with this opinion.

In all other respects, we adhere to our original opinion. The Director's suggestion for rehearing en banc is denied.

AFFIRED IN PART, VACATED
IN PART, AND REMANDED

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 22, 1992

No. 90-1531
87-1913

I.T.O. CORPORATION OF BALTIMORE

Petitioner

v.

WILLIAM SELLMAN; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Petitioner filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for

rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Russell, with the concurrence of Senior Judge Chapman and Judge Williams, U. S. District Judge, sitting by designation.

For the Court,

/s/ Bert M. Montague

CLERK

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 29, 1992

No. 90-1531
87-1913

I.T.O. Corporation v. Sellman

M A N D A T E

The judgment of this Court dated 1/22/92 takes effect today.

BERT M. MONTAGUE
CLERK

APPENDIX H

IN THE SUPREME COURT OF THE UNITED STATES

ESTATE OF FLOYD COWART, *

Petitioner *

v. * No. 91-17

NICKLOS DRILLING COMPANY, *

ET AL. *

* * * * * * * * * * * * *

Washington, D.C.
Wednesday, March 5, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:15 a.m.

APPEARANCES:

LLOYD N. FRISCHHERTZ, ESQ., New Orleans, Louisiana; on behalf of the Petitioner.

H. LEE LEWIS, JR., ESQ, Houston, Texas; on behalf of the private Respondent.

MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Federal Respondent.

C O N T E N T S

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P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 91-17, Estate of Floyd Cowart v. Nicklos Drilling Company.

Mr. Frischhertz, you may proceed.

ORAL ARGUMENT OF LLOYD N. FRISCHHERTZ

ON BEHALF OF THE PETITIONER

MR. FRISCHHERTZ: Mr. Chief Justice, and may it please the Court:

At issue in the Cowart case is the statutory construction of section 33(g), sections 1 and 2, of the Longshore and Harbor Workers' Compensation Act as amended in 1984. The question presented to this Court is whether Cowart's entitlement to additional compensation, or what is called deficiency compensation, is terminated because he failed to obtain written permission from his employer, Nicklos

Drilling, prior to the settlement of a third party claim.

The Court is presented with four separate issues to decide in resolving the Cowart case. One is what is the meaning of a person entitled to compensation under section 33. It has been interpreted to mean a person who is under an order of compensation or a person who has been, who is receiving compensation.

The second issue would be what are the effects of the 1984 amendments to the Longshore and Harbor Workers' Compensation Act with reference to section 33(g)(2), which added a notice provision.

The third issue would be whether, pursuant to the authority of the Sellman decision from the Fourth Circuit, when an employer participates in the settlement process of the third party settlement, does that relieve the employee of obtaining

written permission.

And fourthly, the question would be whether Mr. Cowart's settlement was in fact for an amount less than compensation to which he was entitled to.

The Court, if it resolves any of these issues in favor of Mr. Cowart, would then have to reverse the Fifth Circuit.

We can make short work of this case if we are to apply the holding of Sellman in this particular case. We can avoid --

QUESTION: That is the Fourth Circuit case Mr. Frischhertz?

MR. FRISCHHERTZ: That's the Fourth Circuit case that I attached to my Reply Brief. That case could obviate the necessity of a very intensive discussion of what the '84 amendments meant and what the legislative history intended with regard to the application of 33(g). The Sellman decision simply stated that when the

employer participates in the settlement process 33(g) is not triggered, meaning there is no necessity for the written permission.

This is a different concept than the estoppel concept that was addressed in the 1972 amendments. The Court in Sellman simply says 33(g) is inapplicable to the application of 33(f).

The Court really doesn't go far enough, because if we resort to the simple plain language of the statute with regard to whether permission is required of an employer, all we need look at is the language of the statute. The language of the statute states if the person entitled to compensation enters into a settlement with a third person, when we have an employer such as Nicklos Drilling who not only waived subrogation, had an indemnification provision, had a provision

to defend the third party, actually funded the settlement, how can that be construed to be a settlement with a third person?

QUESTION: Very easily. That's who the settlement was with.

MR. FRISCHHERTZ: The settlement is of a third party settlement, but the settlement was with Nicklos Drilling. They funded it.

QUESTION: That doesn't mean it's with them.

MR. FRISCHHERTZ: That's my argument to the Court, and I buttress that with the provisions of section 8(i) of the act which provides that an employee's termination of compensation can only be effected with a settlement that is submitted to the deputy commissioner and is approved by the deputy commissioner. This was a settlement that circumvented the provisions of section 8(i) of the act that specifically reserves to

the deputy commissioner the right to scrutinize the settlement to determine whether there is adequate compensation.

QUESTION: Why was it a settlement of his compensation claim? It wasn't a settlement of his compensation claim.

MR. FRISCHHERTZ: That's what, that's my -- I agree with the Court. It should not have been a settlement of his compensation claim, but the Fifth Circuit, through its interpretation of 33(g), has held that it's a settlement of his compensation because it terminated his rights under section 33(f) for additional compensation, for future compensation.

QUESTION: The statute says that, doesn't it?

MR. FRISCHHERTZ: The statute says that, but the statute, in the language of it, states a third person. And I submit to the Court that the third person has to be,

as Sellman said, a situation where the employer is not participating in the settlement.

Now this is in conflict with the Fifth Circuit holding. The Fifth Circuit held, in Collier, Luke, and Jackson, that the waiver of subrogation does not act to relieve the requirement of written permission. And in Jackson the Fifth Circuit said even the indemnification agreement does not so act. The Sellman decision is in direct conflict.

I submit that in this case --

QUESTION: Well, Mr. Frischhertz, what do you make of the language in the last clause of section 933(g)(2), which says that benefits are forfeited regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter?

MR. FRISCHHERTZ: That goes to the interpretation of what a person entitled to comp is and what the meaning of the amendments are. My interpretation that is submitted is the same interpretation that the Benefits Review Board held in Kahny, in Dorsey, in Pinell. That interpretation is that Congress in 1984 reenacted word for word section 33(g)(1), which mirrors the prior 33(g).

That interpretation was first gave meaning in O'Leary, the O'Leary decision, which held that a person entitled to compensation is merely, is solely a person who is either under an order of compensation or who is currently receiving compensation. Congress reenacted word for word 33(g) that had been given the interpretation by the Benefits Review Board and by the Ninth Circuit in the unpublished O'Leary decision and by the Kahny decision

in a unpublished Fifth Circuit decision that does have precedential value.

The additional provision of section 33(g)(2) applies to employee, and in fact if you read the language in 33(g)(1) the language is a person entitled to compensation. The language in 33(g)(2) deviates from that and says an employee, and it says if no written approval of the settlement is obtained and filed as required by paragraph (1), the pre-84 statute, or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to the compensation, medical benefits under this chapter shall be terminated, and then the language you're concerned with is regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

That section relates to employees, which is a class that covers all injured employees. It covers injured employees who settle cases for less than their amount, for more than. It covers injured employees who are receiving compensation and who are not receiving compensation. It covers employees who settle for more than or less than. It covers the entire class, and it's read to go very neatly with that class because it encompasses everything. But section (2) only requires notice.

What I submit to the Court is what Congress did was in section (1) adopt the statute as it was understood to mean through a long string of cases, of BRB cases, which was the understanding and the position of the Director of what the meaning was, and Congress was very fearful and they stated in legislative history of these quiet, secret settlements where no

notice is offered to the employer.

So the employer may be refusing to pay compensation, but he still has his subrogation rights. He still has his credit rights. But how can he enforce them? He can only enforce them if he has notice. This is specifically a concern of Congress, and Congress enacted this provision to protect the employer from that specific situation.

QUESTION: But Mr. Frischhertz, didn't Congress have another reference in mind as indicated in the first clause of sub (2), which refers specifically to written approval of settlement obtained as required in (1)?

MR FRISCHHERTZ: That's correct. My, the interpretation that I submit to the Court is that regardless clause refers to employees who fail to notify. Section (2) is reiterating in that first statement, if

no rewritten approval of the settlement is obtained as filed, required by paragraph (1). It's referencing if no written approval is obtained as stated in (1), or the disjunctive. In fact the Fifth Circuit in its ruling essentially rewrote this statute to replace or with and. That is how they justified the wording of the statute.

I must admit that if I read this statute I could be confused. I think it is ambiguous. I think we have to give it judicial interpretation. We have had the Director who argued in behalf of Cowart in the Fifth Circuit panel rehearing and en banc, who gave a brilliant argument as to--

QUESTION: Well, what do we make of the fact that he's not giving the brilliant argument now and the Government has cut his feet off?

MR. FRISCHHERTZ: Well, I don't know if I want to answer for the Government. I think --

QUESTION: I mean, is there anything left for us to defer to?

MR. FRISCHHERTZ: It's interesting-- of course we have acknowledged that deference is to be given to the Director when they have an interpretation that is not inconsistent with the clear language of the statute. It was my belief that they had such an interpretation before the Fifth Circuit. It was my belief that they, in the Longshore Procedural Manual, that they, that I attached, the provision I attached to my Reply Brief clearly states that their position was back in '86, and they stated clearly that their interpretation was a person entitled to comp meant someone who was receiving compensation or who was under an order.

Now there is a very lengthy legislative history that lends to that interpretation, and in fact it is discussed quite extensively by this Court in Bloomer, and it goes through the interpretation, the historical interpretation of how that came about. The historical interpretation starts in '27.

But getting back to the question as to what do we do with the Director's position who since 1977 has followed O'Leary, who has appeared in all of these cases, filed briefs even in the Sellman case, even in the Barger case that was consolidated with this case before the Fifth Circuit, and now appears here with a different position, and for me to suggest the reason for that would, to dwell into the mind and the hierarchy and the powers that control the decision making process--

QUESTION: I just want to know whether there's anything left for us to defer to, regardless of what's in the mind of the hierarchy.

MR. FRISCHHERTZ: The only thing I suggest is there are cases that I cite in the Reply Brief that suggest that when an administrative body changes a long-standing position and makes a 180 degree reversal, that we don't give that new position the deference, but if any deference --

QUESTION: Well, what do we do about the old position? We don't have that to defer to anymore either.

MR. FRISCHHERTZ: Well, I think you can interpret the cases I cited to say that. I don't think we have to even rely on the deference issue. I think we can take and look to what Congress intended. Now let's think for a second. In 1984

Congress knows that O'Leary has made its interpretation. Congress knows that it has been followed inconsistently. Congress knows that if they take and amend the act to overrule O'Leary, that that will have an effect on the current entitlement to hundreds of thousands of workers who settled their cases based on O'Leary, based on what the deputy commissioners told them.

Section 39 of the act says the deputy commissioner is to aid a claimant in making a claim and is to even, if request, provide legal representation. This Director has done so, and in 1984 if Congress amends the act to state O'Leary is overruled without a prospective application, they would take hundreds of thousands of injured, disabled workers, widows, and terminate their compensation. I don't believe Congress intended this.

If Congress had intended that, why did they not--

QUESTION: Excuse me, but at that point the right to compensation is vested, isn't it, for those prior cases?

MR. FRISCHHERTZ: Not when you have a statutory body overruling what was an administrative or a judicial interpretation. It's a retroactive application unless this Court finds differently. That's my general understanding.

But if Congress intended that, why did they not state it in their legislative history? They stated in their legislative history that they were specifically overruling judicial, and they stated they were overruling Washington Transit from this Court.

APPENDIX I

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February 26, 1992

VIA FEDERAL EXPRESS

Mr. John M. Graecen, Clerk
United States Court of Appeals
for the Fourth Circuit
U.S. Courthouse
Tenth and Main Streets
Richmond, Virginia 23219

Re: I.T.O. Corporation of Baltimore v. William Sellman, et al.
Case Number: 90-1531

Dear Mr. Graecen:

This office represents the Employer and Self-Insurer/Petitioner in the above-captioned matter. We have recently received the Director's Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc.

We respectfully request that the Court grant us an opportunity to oppose the Motion for Rehearing, to respond to all matters raised in the Petition for Rehearing and Suggestion

of Appropriateness of Rehearing En Banc, as well as to challenge the standing of the Director to petition for rehearing in this matter.

Thank you for your consideration in this regard.

Very truly yours,

Stan. M. Haynes

SMH/kap

cc: Joshua T. Gillelan, II, Esquire
Paul D. Bekman, Esquire

FILED
FEB 18 1993
OFFICE OF THE CLERK

No. 92-1062

In the Supreme Court of the United States

OCTOBER TERM, 1992

I.T.O. CORPORATION OF BALTIMORE, PETITIONER

v.

WILLIAM SELLMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 33(g)(1) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g)(1), which requires the prior written approval of an employer when a "person entitled to compensation * * * enters into a settlement with a third person," applies when a person entitled to compensation and the employer jointly settle with the third person.

2. Whether an employer, in offsetting a third-party recovery against its compensation liability under Section 33(f) of the LHWCA, 33 U.S.C. 933(f), has the burden of proving which portion of the recovery is for a person entitled to compensation and which portion is for the person's spouse for loss of consortium.

3. Whether the court of appeals complied with the federal rules and the requirements of due process when it reconsidered part of its decision in response to the petition for rehearing filed by the Director, Office of Workers' Compensation Programs.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1062

I.T.O. CORPORATION OF BALTIMORE, PETITIONER

v.

WILLIAM SELLMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. C1-C26) is reported at 954 F.2d 239, and its amended opinion on rehearing (Pet. App. E1-E9) is reported at 967 F.2d 971. The decision and order of the Benefits Review Board (Pet. App. B1-B55) is reported at 24 Ben. Rev. Bd. Serv. (MB) 11. The decision and order of the administrative law judge (Pet. App. A1-A49) is reported at 20 Ben. Rev. Bd. Serv. (MB) 530 (ALJ).

JURISDICTION

The court of appeals entered its initial judgment on January 22, 1992, and its amended judgment on rehearing on June 17, 1992. The petition for rehearing

of the amended judgment was denied on September 22, 1992. Pet. App. F1-F2. The petition for a writ of certiorari was filed on December 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 10, 1979, respondent William Sellman sustained severe head injuries from a 40-foot fall while working for petitioner's predecessor on the ship Algenib, which at the time was docked in Baltimore.[1] Pet. App. A10, B4, C4. On July 24, 1979, he filed a claim under the Longshore and Harbor Workers' Compensation Act (LHWCA) for compensation and medical expenses arising from the fall, which left him paralyzed and confined to a long-term medical care facility. Pet. App. A10-A11, B4. For five years, until July 21, 1984, petitioner voluntarily paid benefits as the statute provides. *Id.* at A11, B4, C4; see 33 U.S.C. 907, 908, 914. By June 1984, these costs totalled $525,000 and were accumulating at the rate of $100,000 to $150,000 a year. Pet. App. A13-A14; see also *id.* at C6.

In 1982, petitioner, William Sellman, and his family sued the Algenib, its owners, and others for damages arising out of this incident. Pet. App. A11, B5, C4. Mr. Sellman, represented by his wife as guardian, alleged six causes of action in tort and admiralty. *Id.* at A11-A12. Mrs. Sellman joined her husband in a

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[1] The predecessor, Atlantic & Gulf Stevedores, merged into I.T.O. Corporation of Baltimore, the petitioner in this case, in 1983. Pet. App. A9-A10. We use the term "petitioner" to refer to both entities.

separate cause of action for loss of consortium, and their children filed a separate claim for damage to their filial relationship. *Id.* at A12.

On June 1, 1984, the attorney for the Algenib's owners notified petitioner and the Sellmans that the ship's mortgagee had started foreclosure proceedings on the ship, which was the owners' only asset. Pet. App. A13, B5. Because the ship was about to be impounded and sold for less than the mortgage amount unless the ITO-Sellman suit was settled in very short order, and no American liens were expected to have priority, petitioner and the Sellmans began expedited settlement negotiations with the shipowners. *Ibid.* On June 18, 1984, they executed two settlements with the Algenib and its owners. *Id.* at A23, B6. Under the "I.T.O. agreement," petitioner received $250,000, and under the "Sellman agreement," the Sellmans received $250,000. Both agreements noted that petitioner had an outstanding lien for the $525,000 in LHWCA benefits it had paid, and that Mr. Sellman remained responsible for the lien "in the event that there is any recovery of any sums of money from any other party not named as a Defendant herein." *Id.* at A18; see *id.* at B6.[2]

On June 28, 1984, to satisfy a contingency in both settlements, the Sellmans' attorney petitioned the

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[2] Courts have construed Section 33(f) of the LHWCA, 33 U.S.C. 933(f), to give an employer a lien on a claimant's third-party recovery so that the employer can recoup benefits already paid, as well as seek a reduction of future payments. See *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 80-81 & n.6 (1980); *Ochoa* v. *Employers Nat'l Ins. Co.*, 754 F.2d 1196, 1198 (5th Cir. 1985).

state court with guardianship jurisdiction over Mr. Sellman to approve the Sellman agreement. Pet. App. A23-A24, A26, B6-B7, C6. The petition, which petitioner's attorney had earlier reviewed without objection, stated that petitioner remained liable for uninterrupted LHWCA compensation and medical benefits and that the Sellman agreement was totally for Mrs. Sellman's loss of consortium. *Id.* at A24-A25, B9. On July 2, 1984, the state court approved the agreement and on July 10, 1984, the Algenib defendants delivered the $250,000 in proceeds from the I.T.O. agreement to petitioner. *Id.* at A27.

Eleven days later, on July 21, 1984, petitioner made its last payment of LHWCA compensation. Pet. App. A5, B4, C4. On August 2, 1984, it notified the Sellmans and the Department of Labor that it had suspended its compensation payments until it had offset the proceeds from the Sellman settlement against its future LHWCA liabilities. *Id.* at A28. Petitioner also refused to sign the standard form evidencing its consent to the settlement of William Sellman's claim against the Algenib defendants. *Id.* at A28-A29, B8. Mr. Sellman subsequently obtained an ALJ hearing to determine his eligibility for future compensation, *id.* at A1-A2, and petitioner alleged that under Section 33(g) of the LHWCA, its refusal to sign relieved it of liability for any future compensation. *Id.* at B11-B12.[3]

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[3] At the time of petitioner's refusal, Section 33(g) provided for forfeiture of compensation if a person entitled to compensation entered into a settlement with a third party without the employer's prior written approval, which "shall be made on a form provided by the Secretary [of Labor]." 33 U.S.C. 933(g)

2. The ALJ awarded compensation. He reasoned that petitioner was not entitled to offset any part of the Sellman settlement because the parties to the Algenib lawsuit had intended that settlement to be solely for Mrs. Sellman's loss of consortium. Pet. App. A34-A40. The ALJ found the settlements ambiguous on how the Sellman proceeds should be apportioned and determined the parties' intent through extrinsic evidence. *Id.* at A35-A38. Crediting the testimony of attorneys for the Algenib defendants and the Sellmans over the testimony of petitioner's attorney, the ALJ found both that the state court petition for approval of the Sellman agreement was part of the Algenib settlement and that petitioner was estopped from objecting to the petition's terms setting out the parties' intent. *Id.* at A35-A39.

The ALJ also rejected petitioner's argument that its refusal to sign the Department of Labor's consent form relieved it of all compensation liability under Section 33(g). Pet. App. A40-A45. The ALJ recognized that because Mr. Sellman was receiving compensation at the time of settlement, he was a "person entitled to compensation" as the Benefits Review Board had construed that phrase, and that in several cases the Board and the Fifth Circuit had

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(1982). In September 1984, Congress amended Section 33(g) to provide for a forfeiture of medical benefits as well as compensation either in that event or if an employee failed to notify the employer of any settlement or judgment against a third party. See 33 U.S.C. 933(g)(2); Pub. L. No. 98-426, § 21(d), 98 Stat. 1652. As of the ALJ hearing, petitioner continued to pay Mr. Sellman's medical expenses, Pet. App. A11, and the Board held that those expenses were not subject to termination under the amended Section 33(g). Pet. App. B12-B14.

refused to read exceptions into Section 33(g)'s approval requirement. Pet. App. A41-A42. The ALJ stated that these precedents did not control the instant case, however, because petitioner itself entered the settlement and the claimant was not acting unilaterally against the employer's interests. *Id.* at A43. The ALJ concluded that applying Section 33(g) in these circumstances would do little to further that Section's purpose of protecting the employer against unilateral settlements, or the LHWCA's purpose of compensating injured longshore workers. Pet. App. A43-A44. Instead, it would lead to a "harsh and unfair" result of rewarding an employer who "orally agreed to execute the [Department's] form, reaped the benefits from its settlement agreement and then reneged on signing the form for the sole purpose of defeating [Sellman's] right to recover." *Id.* at A44-A45.[4]

3. The Benefits Review Board affirmed. It rejected petitioner's argument that the ALJ impermissibly created an equitable exception to Section 33(g). Instead, the Board ruled that petitioner had given constructive approval to the Sellman settlement. Pet. App. B14-B20. It further agreed with the interpretation of the statute advanced by the Director, Office of Workers' Compensation Programs, that the requirement of employer approval of a third-party settlement under Section 33(g) does not apply where, as here, the "employer is also a party to the settlement." Pet. App. B20.

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[4] The ALJ also found that petitioner was not liable for costs in obtaining a guardianship for Mr. Sellman. Pet. App. A45-A46. Those costs are no longer at issue.

A majority of the Board also affirmed the ALJ's conclusion that petitioner was not entitled to offset the net proceeds of the Sellman settlement against its future LHWCA obligations. It reasoned that the parol evidence rule did not apply because neither the I.T.O. nor the Sellman agreement specified whether I.T.O. waived its offset rights. The Board thus concluded that the ALJ's reliance on extrinsic evidence to establish a waiver was justified. Pet. App. B25-B36.[5]

4. The court of appeals affirmed in part and reversed in part. It agreed with the Board and the Director that Section 33(g) did not apply because petitioner participated in the Algenib settlements. Pet. App. C14-C16. The court explained that the purpose of that Section was to prevent "the claimant from acting unilaterally to the detriment of the employer by accepting less in settlement than [he] might be entitled to and thus reducing employer's offset." *Id.* at C14; see *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968). That purpose would be "ill served" where an employer has

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[5] Judge Brown concurred with the holding that Section 33(g) did not apply, because Section 33 requires approval when the injured employee alone institutes the third-party suit, but not when the employer does so or when both sue the third party. Pet. App. B40-B41. He also found signing of the Department's form "superfluous in view of the signed agreement," and noted the employer's oral consent to the settlement. *Id.* at B42. He dissented on the offset issue, however, construing the settlement as a waiver of petitioner's lien for benefits already paid but not a waiver of its right to offset its future LHWCA liabilities against the Sellman settlement. *Id.* at B42-B55.

participated in the settlement process and thereby itself protected its offset right. Pet. App. C14-C15. Accordingly, the court read Section 33(g) to refer only to unilateral settlements by the claimant, and concluded that the statute "contains no reference to written approval or notice requirements where the employer participates in the settlements." Pet. App. C16.

The court reversed the Board's denial of an offset under Section 33(f). Without deciding whether extrinsic evidence was admissible, the court concluded that there was no evidentiary showing that petitioner intended to waive its lien.[6] Pet. App. C17-C18. Having found no waiver, the court then allowed petitioner to offset all of the net proceeds from the Sellman settlement against its LHWCA liability. Pet. App. C22-C23. Relying on *Force* v. *Kaiser Aluminum & Chemical Corp.*, 23 Ben. Rev. Bd. Serv. (MB) 1 (1989), the court upheld petitioner's right to a total offset because the settlement agreement did not specifically apportion the amounts intended for the claimant and the amounts intended for family members. Pet. App. C23.[7]

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[6] Specifically, the court agreed with the dissenting Board member that the state court petition did not "augment" the I.T.O. and Sellman settlements and that the ALJ had misconstrued the testimony of the Algenib attorney. Pet. App. C18-C22.

[7] The court of appeals also rejected the Director's argument that petitioner waived its lien when it chose not to enforce its right to have the $250,000 in proceeds from the Sellman settlement transferred directly to itself. Pet. App. C23-C25.

5. The Director filed a petition for rehearing, noting that the Ninth Circuit had recently reversed *Force* in relevant part. *Force* v. *Director, OWCP*, 938 F.2d 981 (9th Cir. 1991). In response, the court of appeals amended its decision. Pet. App. E5. The court agreed with the Ninth Circuit that a settlement agreement that is silent on apportionment does not preclude the ALJ from determining the portion intended for the claimant and the portion intended for family members. The court of appeals also adopted the Ninth Circuit's view that the employer bears the burden of proof on the apportionment issue. *Id.* at E6-E7. The court remanded the case with the suggestion that the ALJ reopen the record for further evidence on any intended apportionment of the settlement proceeds. Pet. App. E7, E9.[8]

On September 22, 1992, the court denied a petition for rehearing, filed by petitioner. Pet. App. F1-F2.

ARGUMENT

1. Petitioner contends (Pet. 20-40) that Section 33(g)'s requirement of employer approval of third-party settlements applies even when the employer itself participates in the settlement. The court of appeals' decision rejecting that claim, which addressed a matter of first impression in the circuit courts, is correct and does not warrant this Court's review.

Section 33 of the LHWCA governs the rights of a person entitled to compensation and his employer in

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[8] The court rejected the Director's arguments that it had overstepped its scope of review by setting aside the ALJ's assessment of the existing offset evidence. Pet. App. E8.

recovering damages from a third party for a work-related injury. Both the person entitled to compensation and the employer have rights to sue a third party. See 33 U.S.C. 933(a) and (b). If the employer sues, it has an unqualified right to settle with the third party, and can retain that part of the net recovery required to fund its LHWCA liability. 33 U.S.C. 933(d) and (e). If the claimant sues, he retains his right to claim LHWCA compensation, 33 U.S.C. 933(a), but the employer can offset the claimant's net third-party recovery against its LHWCA liabilities. 33 U.S.C. 933(f). Section 33(g) protects the employer's offset rights by requiring the claimant to notify the employer of any settlement or judgment in his third-party suit and to obtain the employer's prior written approval of a settlement for less than the claimant's LHWCA compensation entitlement, or else forfeit rights to future compensation and medical benefits. 33 U.S.C. 933(g).

The Director has read Section 33(g)(1) to apply only where a claimant unilaterally settles a third-party action, and not where the employer participates in the settlement. The language of the statute, read in the context of the LHWCA, supports that interpretation. The statute provides for a forfeiture of LHWCA benefits if a "person entitled to compensation (or the person's representative) enters into a settlement with a third person" without employer approval. 33 U.S.C. 933(g)(1). The statute does not say that employer approval is required, and the forfeiture remedy applies, when the person entitled to compensation and the employer *jointly* settle with a third person. If Congress had intended to require

claimants to seek their employers' specific written approval of a settlement that the claimant and the employer jointly accomplish with a third person, it would have used language aptly designed to convey that requirement; but the statute does not do so. Moreover, there is no reason why Congress would have intended Section 33(g)'s written approval requirement to apply to such joint settlements, because Section 33 contemplates a suit by a claimant *or* a suit by the employer—not suits in which the claimant and the employer both participate in claiming against a third party.[9]

The Director's reading accords with the purposes and policies of the LHWCA. The written approval requirement "protects the employer against his employee's accepting too little for his cause of action against a third party." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2598 (1992), quoting *Banks*, 390 U.S. at 467. There would be no point in applying the written approval requirement, however, when the employer itself negotiates and agrees to the

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[9] Under Section 33(b), the claimant ordinarily has the right to sue, but a failure to do so within a specified period may operate as an assignment of this right to the employer. 33 U.S.C. 933(b); see *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981). In 1982, when petitioner and the Sellmans sued the Algenib defendants, only petitioner had a right to sue under the LHWCA, under prevailing Fourth Circuit law. See Pet. App. B21 n.9. Petitioner's statement that it was merely a "use plaintiff in the Claimant's third-party lawsuit," Pet. 6, is therefore inaccurate. See also *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969) (employer may sue third party independent of Section 33 to recover benefits it has paid).

third-party settlement. Just as the claimant's acceptance of a court-ordered remittitur does not implicate the policies underlying the written approval requirement of Section 33, *Banks*, *supra*, so too a joint settlement of a third-party claim does not implicate the purposes of Section 33.

The only purpose that would be served by applying Section 33 here would be to allow the employer to enter into a joint settlement and then refuse to sign the Department's form "for the sole purpose of defeating [a] Claimant's right to recover." Pet. App. A44-A45. The language of the LHWCA does not require that result, and the Act should be construed to avoid such "harsh and incongruous results." *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953); see *Bell* v. *O'Hearne*, 284 F.2d 777, 781 (4th Cir. 1960) ("In the absence of language plainly demanding it, a construction [of Section 33(g)] is not to be favored which visits a forfeiture on the employee or his dependent and gives a windfall to the insurance carrier.").[10]

Contrary to petitioner's contention (Pet. 20-25), the court of appeals' decision does not conflict with this Court's decision in *Estate of Cowart* v. *Nicklos Drilling Co.*, *supra*. The only question in that case was whether Section 33(g)'s forfeiture "applies to a

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[10] Petitioner does not dispute that its interpretation will lead to harsh and unfair results, but argues that the court of appeals' interpretation is contrary to the 1972 amendments to the LHWCA. Pet. 26-32. That is incorrect. Those amendments were designed to prevent courts from holding that employers "are estopped to deny they have given their written approval when in fact no such written approval was given," S. Rep. No. 1125, 92d Cong., 2d Sess. 14 (1972). Here, the court of appeals did not rely on estoppel. Pet. App. C15.

worker whose employer, at the time the worker settles with a third party, is neither paying compensation to the worker nor is yet subject to an order to pay under the Act." 112 S. Ct. at 2592. The Court held that Section 33(g) does apply in that situation and rejected the argument that an unpaid claimant is not a "person entitled to compensation" under Section 33(g). 112 S. Ct. at 2595-2598. The question here, in contrast, is whether Section 33(g) applies to joint settlements involving a person entitled to compensation, a third party, and the employer. The Court expressly declined to address that issue in *Estate of Cowart* "because it is not fairly included within the question on which certiorari was granted." 112 S. Ct. at 2598.[11]

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[11] Petitioner also errs in suggesting that the reasoning of *Cowart* is inconsistent with the court of appeals' decision. *Cowart*'s reasoning was based on the various uses of the phrase "person entitled to compensation" in the LHWCA, as well as the specific language in Section 33(g)(2) that removed any doubt that the forfeiture rule applied whether or not the settling claimant was receiving or had been acknowledged to be entitled to LHWCA benefits. 112 S. Ct. at 2595-2598. Here, in contrast, the issue turns on whether the employer's participation in the settlement is relevant to the applicability of the employer-approval requirement; the materials canvassed in *Cowart* do not address that issue. Petitioner also errs in stating (Pet. 40) that the Director's brief in *Cowart* argued that Section 33(g) should be "strictly construed." To the contrary, the Director recognized that the LHWCA should be liberally construed in favor of claimants, but noted that that rule does not override unambiguous terms of the statute. Gov't Br. at 31, *Estate of Cowart* v. *Nicklos Drilling Co.* (No. 91-17). The Director also pointed out that the issue involved in *this* case was not at stake in *Cowart*. *Id.* at 23 n.17.

Nor does the court of appeals' decision conflict with decisions of the Fifth Circuit, as petitioner argues. Pet. 34-40. The Fifth Circuit's original panel decision in *Cowart* did not address the three-party settlement question.[12] Although the panel decision included broad language indicating that there are "no exceptions" to Section 33(g)'s approval requirement, see Pet. 35-37, the panel decision was vacated when the full court granted rehearing, see 5th Cir. R. 35, I.O.P., and the full court, in reviewing the issue, did not adopt such broad language. See *Nicklos Drilling Co.* v. *Cowart*, 907 F.2d 1552, 1554 (1990), aff'd en banc, 927 F.2d 828 (5th Cir. 1991).

Similarly, a joint settlement was not at issue in *Petroleum Helicopters, Inc.* v. *Collier*, 784 F.2d 644 (5th Cir. 1986). In that case, the court held that Section 33(g) applied to a claimant's settlement with a third party even where an employer contractually waived its subrogation rights against the third party. 784 F.2d at 645-646. The Fifth Circuit's conclusion was based on its view that the employer retained an interest in the terms of the settlement despite its contractual waiver of subrogation. *Id.* at 646-647. That interest was the employer's "statutory right to a set-off against his compensation payments for any amount received by the employee by way of settlement with a third party tortfeasor" under Section 33(f). 784 F.2d at 646. Petitioner in the instant case stands in an entirely different posture, because it

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[12] Petitioner recognized in the court of appeals that the main issue before the Fifth Circuit in *Cowart* was different from the issue in this case. Pet. C.A. Reply Br. 6.

actually joined in the settlements with the third party.

2. Petitioner contends (Pet. 40-45) that the court of appeals erred in holding that when an employer seeks to credit a third-party recovery against its future LHWCA liabilities under Section 33(f), it bears the burden of proving how much of the recovery is apportionable to the person entitled to compensation.[13] There is no merit to that claim, and the court's decision does not conflict with that of any other court.

The court of appeals' allocation of the burden of proof is consistent with the general rule in LHWCA proceedings that doubtful questions of fact are resolved in the claimant's favor. See, *e.g.*, *Avondale Shipyards, Inc.* v. *Kennel*, 914 F.2d 88, 90-91 (5th Cir. 1990); *Force* v. *Director, OWCP*, 938 F.2d 981, 985 (9th Cir. 1991). The application of that rule here is particularly appropriate "because the employer remains liable for the full amount of the statutory compensation absent a showing that the claimant has been compensated by a third party." *Force*, 938 F.2d at 985. Section 33(f) gives an employer what amounts to an affirmative defense to an otherwise valid claim. "To ensure that the claimant receives his due, the employer must carry the burden of proving what is the claimant's portion of the group settlement." 938 F.2d at 985; see also Pet. App. E7.

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[13] Petitioner does not dispute that it may credit only settlement amounts attributable to Mr. Sellman and not amounts attributable to Sellman family members. See *Force* v. *Director, OWCP*, 938 F.2d 981, 985 (9th Cir. 1991); 2A Arthur Larson, *The Law of Workmen's Compensation* § 74.36 (1992).

Petitioner does not dispute that it is "most similarly situated to a plaintiff" on the apportionment issue, Pet. App. E7, but instead argues (Pet. 42) that the burden of proof should be placed on the claimant because Section 33(f) is designed to protect the employer. The provision, however, is at least partially designed to ensure that if the claimant received less in a tort suit than what he was entitled to under the LHWCA, the employer would make up the difference.[14] Nor will employers have undue difficulty in meeting their burden of proof, as petitioner states (Pet. 43, 45). ALJs can "look to such objective factors as how the settlement sum was actually distributed * * * and the going rate for settlements or judgments for the same types of injuries." *Force*, 938 F.2d at 986; see also Pet. App. E5-E6. Employers and claimants

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[14] As enacted, the LHWCA required a claimant to elect between suing a third party and receiving compensation. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 33, 44 Stat. 1440. Section 33(f) mitigated that election requirement by providing that if the third-party recovery was less than the claimant would have received in compensation, the employer would make up the difference. See *Chapman* v. *Hoage*, 296 U.S. 526, 528 (1936). After the LHWCA was amended to allow a claimant to sue a third party while receiving compensation, courts construed Section 33(f) to provide a lien on a claimant's third-party recovery in favor of an employer who had paid compensation. See *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 79 (1980). The purpose of the lien was to prevent a claimant from receiving double recovery, *ibid.*, not to assist employers in meeting their obligations to make future payments.

should have relatively equal access to such information.[15]

In any event, the issue does not merit this Court's attention at this time, as the decision below is interlocutory. The ALJ has not yet determined how to apportion the Sellman settlement proceeds, and the allocation of the burden of proof may make no difference to the result in this case. There is no reason for this Court to depart from its usual practice of declining to review orders of the courts of appeals that are not final. See *Brotherhood of Locomotive Firemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967).

3. Petitioner argues (Pet. 46-55) that the court of appeals violated federal procedural rules and denied it due process by granting the Director's petition for rehearing without accepting a response. As petitioner recognizes (Pet. 46-47), Fed. R. App. P. 40(a) provides that a court "ordinarily" will not grant rehearing without requesting a response. The clear implication of the rule is that a court may refrain from obtaining a response in appropriate circumstances. See *United States* v. *Allegheny-Ludlum Indus., Inc.*, 568 F.2d 1073 (5th Cir. 1978) (no response to rehearing petition necessary where intervening decision of this Court is controlling); cf. R. Stern, E.

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[15] Petitioner also argues (Pet. 44) that the settlements in this case are unambiguous and that allowing extrinsic evidence to prove apportionment will violate the parol evidence rule. That factbound issue does not merit review, but we note that petitioner is wrong; the settlements *are* ambiguous, because they provide that *all* Sellmans are settling parties but are silent as to how much of the Sellman settlements each Sellman receives. See Pet. App. A26-A27.

Gressman, & S. Shapiro, *Supreme Court Practice* 616 (6th ed. 1986) (this Court has occasionally "viewed the grounds for rehearing as so strong and so obvious that calling for a response was deemed superfluous"). Here, the Director's petition informed the court that the Ninth Circuit had recently reversed the Benefits Review Board's decision on which the court of appeals had relied in its initial opinion. Pet. App. E5. A response was unnecessary because it was obvious that the court would have to amend its opinion to address the Ninth Circuit's reversal.

Moreover, the court of appeals did not deprive petitioner of an opportunity to be heard on the Section 33(f) issue. When the court granted rehearing, that issue had already been fully briefed and argued; the Ninth Circuit decision was simply a significant and relevant authority that was presented to the court after briefing and argument. Due process does not require a court to entertain any additional argument in such circumstances. Cf. Fed. R. App. P. 28(j) (when a party brings such authorities to the court's attention before decision, it must do so "without argument"). Moreover, petitioner had the opportunity to present its views on *Force* in its own petition for rehearing that it filed after the court issued its amended decision.[16]

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[16] Petitioner errs in arguing (Pet. 49-51) that the Director's petition for rehearing was untimely. The Director requested and the court granted an extension of time to file the petition within the 14-day period specified in Fed. R. App. P. 40(a). See App., *infra* (order granting extension within 14-day period). Petitioner's complaint that the Fourth Circuit violated its own rules in granting the extension is also meritless, see 4th Cir. I.O.P. 40.2, 40.3, and, in any event,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1993

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whether the court of appeals complied with its internal operating procedures in granting an extension of time is not a question that merits this Court's attention.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1531
87-1913

I.T.O. CORPORATION OF BALTIMORE
PETITIONER

v.

WILLIAM SELLMAN; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
RESPONDENTS

[Filed Feb. 3, 1992]

ORDER

The government has filed a motion for an extension of time to file a petition for rehearing.

The Court extends the time for filing a petition for rehearing pursuant to I.O.P. 40.3 until February 19, 1992. If the government determines not to seek rehearing prior to the expiration of the time period as extended, counsel shall immediately notify the Court in writing.

For the Court—By direction.

/s/ John M. Greacen

CLERK

Supreme Court, U.S.
FILED
FEB 22 1993
OFFICE OF THE CLERK

No. 92-1062

In The

Supreme Court of the United States

October Term, 1992

I.T.O. CORPORATION OF BALTIMORE,

Petitioner,

vs.

WILLIAM SELLMAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS WILLIAM AND RHODA SELLMAN

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QUESTIONS PRESENTED FOR REVIEW

I. Should this Court grant a writ of certiorari where there is no conflict among the Circuits that in an action under the Longshore and Harbor Workers' Compensation Act (LHWCA), an employee need not file a LS33 form where the employer is an actual party to a third party suit and fully participates and effectuates a settlement of that suit?

II. Should this Court grant a writ of certiorari where there is no conflict among the Circuits that in an action under the Longshore and Harbor Workers' Compensation Act (LHWCA), a third party settlement intended to be compensation for loss of consortium is not subject to an offset of compensation benefits?

III. Should this Court grant a writ of certiorari to determine whether the Fourth Circuit properly followed its own local rules?

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No. 92-1062

In The

Supreme Court of the United States

October Term, 1992

I.T.O. CORPORATION OF BALTIMORE,

Petitioner,

vs.

WILLIAM SELLMAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS WILLIAM AND RHODA SELLMAN

STATEMENT OF THE CASE

On July 10, 1979, the Respondent, William H. Sellman, 46 years old, was severely injured when he fell approximately 40 feet while on the vessel ALGENIB upon which he was working. As a result of the fall, the Respondent sustained severe head trauma, including a fractured skull, was rendered partially paralyzed, and

was left in need of extensive medical and hospital care. He is now confined to a bed or wheel chair and for the most part is non-communicative. There is no dispute that he is permanently totally disabled.

The Respondent, Rhoda Sellman, is Mr. Sellman's wife and was appointed his legal guardian by the Circuit Court for Baltimore County. She manages all of Mr. Sellman's personal affairs and assets since he is unable to do so as a result of his debilitated condition.

The Petitioner, I.T.O. Corporation of Baltimore, is the successor corporation to Mr. Sellman's employer at the time of his injury, Atlantic & Gulf Stevedores, Inc. Mr. Sellman's employer commenced the payment of workers' compensation benefits under the Longshore and Harbor Worker's Compensation Act following his injury.

Thereafter, the Atlantic & Gulf, through its own counsel, and Mr. Sellman, Mrs. Sellman, and their children, through their personal attorney, filed a joint lawsuit against various third parties, including the owners of the vessel on which Mr. Sellman was injured. Count IX of the Complaint was a claim by the Petitioner for compensation "for the medical and hospital care and treatment which it has and will supply to William H. Sellman, Jr., Plaintiff." I.T.O. agreed to fund the expenses of the trial and participated in all facets of the case. It was represented in the case by A. Owen Hennegan and later by his son, John O. Hennegan.

The Sellmans and I.T.O. entered into extensive settlement negotiations with the vessel's owner. Liability was extremely difficult in the case and I.T.O. was well aware of the complexities of the case. The parties eventually entered into joint settlement agreements with the owner of the ALGENIB. The parties agreed to accept a total of $500,000 of which the Sellmans and I.T.O. each

agreed to accept $250,000. All of the parties to the settlement agreements recognized that the intent of the agreement was that the Petitioner, I.T.O., would accept $250,000 in full satisfaction of its lien, that the Respondents, William and Rhoda Sellman, would receive $250,000 free and clear of any lien, and that compensation benefits would continue *without offset*. There was a dispute as to whether the Sellman money was compensation for Mr. Sellman's injuries, the Sellman's loss of consortium, or both.

After the disbursement of the settlement proceeds, counsel for Mr. Sellman asked I.T.O. to sign and file a LS-33 Employer Approval Form to approve of the Sellmans' third party settlement. I.T.O. refused to sign the form and terminated temporary total disability payments. The Sellmans then requested a hearing on the issue of whether the termination was proper.

On June 24, 1985, after an informal conference, the Deputy Commissioner entered his Memorandum of Informal Conference wherein the he recommended a finding that the $250,000 paid by the third party to the Sellmans was paid for loss of consortium only and was not subject to offset by the employer. (Apx. A). He also held that the filing of the form was unnecessary due to the employer's participation in the third party case and he suspended the requirement for the filing of the LS-33 form.

I.T.O. took an appeal and a hearing was held before The Honorable G. Marvin Bober, an administrative law judge, over a period of several days at which time testimony was taken from all pertinent witnesses. On June 29, 1987, Judge Bober concluded that the employer was not entitled to an offset of $250,000 against compensation and medical payments under the LHWCA. Judge Bober also held that the employer was not entitled to terminate future compensation and medical benefits to the Respondent based upon the failure to file a LS-33 approval form. In so holding, he found that even if the settlement was not for loss of consortium, the

filing of an LS-33 form was not required under the facts and circumstances of the case. He held that the filing requirements of 33(g) did not apply where ". . . the employer from the start is a co-plaintiff in the third party lawsuit and negotiates and enters into its own settlement agreement with the defendants . . ." and where the evidence further showed that the employer, and not the Respondent, was in control of the lawsuit, thus eliminating the possibility that the Respondent would act unilaterally against the employer's interest. (Apx. B).

On July 31, 1990, the Benefits Review Board filed its decision and order affirming the findings of Judge Bober. (Apx. C). The Board held that under the facts and circumstances of this case, the statutory requirement of written approval and the filing of an LS-33 administrative form was satisfied or otherwise inapplicable. The Board held that the statutory filing requirement is inapplicable where the employer itself is a party to the litigation, actively involved in settlement negotiations, and executes a settlement agreement to dispose of the entire third-party claim. The Board also agreed that I.T.O. was not entitled to any offset.

I.T.O. appealed to the Court of Appeals for the Fourth Circuit which affirmed in part and reversed in part the decision of the Board. *See I.T.O. Corporation v. Sellman*, 954 F.2d 239 (4th Cir. 1992) (Apx. D). The Fourth Circuit affirmed the Board's holding that Section 33(g) did not apply where the employer is a party to the lawsuit and participates fully in settlement negotiations. However, it reversed the portion of its decision finding that there was no offset for the net benefit received by Mr. and Mrs. Sellman. In doing so, it relied primarily upon the case of *Force v. Kaiser Aluminum & Chemical Corporation*, 23 BRBS 1 (1989), *rev'd in part sub. nom. Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991), which had held that if the settlement agreement is silent on the distribution of the settlement proceeds, then no apportionment can be made for the loss of consortium count.

However, the Ninth Circuit reversed this portion of the *Force* holding in *Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991). The Ninth Circuit held that the Administrative Law Judge must decide as a matter of fact which portion of the settlement was intended to be apportioned for loss of consortium. *Id.*, 938 F.2d at 985-986. The employer bears the burden of establishing the amount of the credit. *Id.*

As a result of the decision of the Ninth Circuit in *Force*, the Director then filed a Petition for Rehearing and the Fourth Circuit then modified its earlier ruling. *I.T.O. Corporation v. Sellman*, 967 F.2d 971 (4th Cir. 1992) (Apx. E). It held that the Administrative Law Judge must determine the amount of the settlement that was intended to be compensation for loss of consortium. The case was then remanded to the Administrative Law Judge to hear evidence on this issue.

Subsequent to the Fourth Circuit's second decision in this case, this Court decided the case of *Estate of Cowart v. Nicklos Drilling, Co.*, __ U.S. __, 112 S. Ct. 2589 (1992). In *Cowart*, this Court held that Section 33(g) requires that the employer consent in writing to a settlement under Section 33(g) even if the employer had not yet paid compensation benefits.

I.T.O. then filed a Petition for Rehearing arguing that under *Cowart*, the failure to file the LS-33 form terminated Mr. Sellman's right to benefits. The Respondents opposed the Petition as did the Director and the issue was fully briefed. The Fourth Circuit denied the Petition for Rehearing.

Dissatisfied with the decisions below, I.T.O. has now filed a Petition for Certiorari. As shall be explained below, these issues do not warrant consideration by this Court since there is no conflict amongst the Circuits and the decision of the Fourth Circuit does not conflict with this Court's decision in *Cowart*.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO REASON TO GRANT REVIEW ON THE ISSUE OF WHETHER SECTION 33(G) REQUIRES THAT AN LS-33 FORM BE FILED SINCE THERE IS NO OTHER DECISION IN CONFLICT WITH THE FOURTH CIRCUIT'S DECISION BELOW.

A. Contrary To I.T.O.'s Assertion, There Is No Conflict Between This Case And This Court's Decision In *Cowart.*

In *Estate of Floyd Cowart, Petitioner v. Nicklos Drilling Co.*, __ U.S. , __ 112 S.Ct. 2589 (1992), decided just eight months ago, this Court interpreted the application of 33 U.S.C. Section 933(g) [Section 33(g) of the Longshore and Harbor Workers' Compensation Act] at great length. It held that a person who settles a third party case must file a LS-33 form even if they have not yet made a worker's compensation claim. Unlike in the instant case, the employer in *Cowart* was not a party to the lawsuit and did not participate in the litigation through its own counsel.

The express language of the statute makes it obvious that it does not apply where the employer enters into a settlement with a third party. The pertinent portion of Section 33(g) states as follows:

> (1) *If the person entitled to compensation enters into a settlement with a third person* . . . for an amount less than the compensation to which the person . . . would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier . . . [Emphasis Added].

33 U.S.C. Section 933(g).

Here, the "the person entitled to compensation *and the employer*" entered into a settlement with the third person. Therefore, Section 933(g) does not apply. As the Fourth Circuit explained in its first decision in this case, Section 33(g) does not apply here because the person entitled to benefits, Mr. Sellman, and the employer were both parties to the case and simultaneously settled the case:

> We agree with the claimant and the Board that the purposes of section 33(g) would be ill served by permitting the termination of benefits where employer has directly insured, by its own actions, the protection of its offset rights. *In this case, I.T.O. directly participated in the third-party action against the ALGENIB defendants, and fully participated in the negotiations . . .*
>
> . . . [The] employer's conduct in this case rendered section 33(g) inapplicable. The language of the statute supports this construction. *Section 33(g) contemplates a situation where "the person entitled to compensation" reaches a settlement with a third party. This language reflects the concern alluded to earlier over unilateral action which is detrimental to the employer. Conspicuously, the statute contains no reference to written approval or notice requirements where the employer participates in the settlements.* Accordingly, we conclude that written approval is unnecessary.

I.T.O. Corporation v. Sellman, 954 F.2d 239, 242-243 (4th Cir. 1992) (emphasis added).

Here, the employer (1) was a party to the third party suit; (2) had its own counsel participate in the litigation; (3) maintained actual control over the litigation; and (4) simultaneously settled its case with the Claimant and the third party. This is not a case where I.T.O. was surprised or harmed by the outcome of the third party proceedings. They were fully aware of the settlement arrangement. In fact, they benefited from the settlement because the case was extremely difficult to win and $250,000 was certainly better than no recovery at all. If the Claimant was not given a portion of the recovery, then he would have had no incentive to agree to the settlement and he would have proceeded to trial.

Incredibly, I.T.O. now argues that the filing of the written form is necessary *even where it is a party to the case and controls the litigation.* This makes no sense. If I.T.O. was unhappy with the settlement offer, it could have rejected the offer and the case would have proceeded to trial. The case could not settle without their consent since they were a party to the proceedings.

The purpose of Section 33(g) is to ". . . protect against an employee accepting too little . . . in those circumstances where . . . [the employee] . . . is in control of the litigation." *Banks v. Chicago Grain Trimmer Assoc.*, 390 U.S. 459 (1968); *Robinson Terminal Warehouse Corp. v. Adler*, 440 F.2d 1060 (4th Cir. 1971). When an employer actively negotiates its own interest and controls the third party case, its interests are adequately protected without resort to Section 33(g). *Williams v. Halter Marine Services, Inc., et al.*, 19 BRBS 248 (1987). There is no such danger where the employer institutes the third party suit, protects its own interest, is represented by its own attorney, and actively participates in settlement negotiations. Therefore, the Fourth Circuit decision in this case is proper and should not be disturbed.

This Court, in *Cowart,* in fact recognized two exceptions to the filing requirement where notice to the employer was deemed to be unnecessary in circumstances along these lines. First, where the case proceeds to trial and a judgment is obtained, then no written requirement exists because the consent of the employer would serve no purpose since the employee cannot determine the amount. *Id.*, 112 S.Ct. at 2598. Second, where the employee settles for an amount greater than the lien of the employer, then written approval is not necessary since the employer is fully protected. *Id.* Similarly, where the employer files the suit and controls the litigation, requiring written consent would serve no useful purpose.

Moreover, the LHWCA, and Section 33(g) in particular, were based upon the New York worker's compensation scheme. *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 81, n.5 (1980). The courts construing the New York compensation statute have recognized that employer approval of third party settlements is not necessary where a duly authorized representative of the carrier actively participates in the third party settlement and obtains a direct benefit for the carrier. *Noyes v. First National City Bank,* 39 A.D.2d 183, 333 N.Y.S.2d 117, 119 (1972), *aff'd mem.*, 33 N.Y.2d 723, 349 N.Y.S.2d 996, 304 N.E.2d 565 (1975).

B. Unlike In *Cowart,* The Director Has Supported The Respondents' Interpretation Of The Act And Its Interpretation Should Be Given Deference.

This Court placed great emphasis in *Cowart* on the fact that the Director modified its earlier position and supported the eventual Supreme Court decision. The Supreme Court noted that had the Director maintained his original interpretation of Section 33(g), the Court's decision may have been difficult since the Court must give "judicial deference to a reasonable statutory interpretation by an administrative agency." *Id.*, 112 S.Ct. at 2594; *see also, Chevron, U.S.A., Inc. v. Natural Resources Defense*

Council Inc., 467 U.S. 837 (1984); *National R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S __, 112 S.Ct. 1394 (1992). Since the Director had changed its stance which was in conflict with the original ALJ decision, no weight was to be given to the contrary position.

In the instant case, the Director has maintained all along that Section 33(g) does not apply in this case since the employer was a party to both the third party case and the settlement negotiations. The Director vehemently argued this position before the Fourth Circuit. The Respondent has been informed that the Director maintains that same position today even after the Supreme Court decision in *Cowart.* Thus, great deference should be given to the Director's position which is entirely consistent with this Court's previous decision on this issue.

C. There Is No Conflict Among The Circuits On This Issue.

There is *no* case in any other Circuit which is in conflict with the decision of the Fourth Circuit below. No other appellate court has decided the issue of whether a LS-33 form must be filed where the employer is a party to the litigation. The time is not ripe for this Court to take this issue at this time. Instead, it should wait for other appellate courts to face the issue squarely in light of this Court's decision in *Cowart.*

I.T.O. cannot point to a single decision where a court held that the LS-33 form must be filed where the employer is a party to the suit. Instead, it attempts to argue that the Fourth Circuit decision in this case is inconsistent with decisions of the Fifth Circuit in *Petroleum Helicopters Inc. v. Collier,* 784 F.2d 644 (5th Cir. 1986) and *Nicklos Drilling Co. v. Cowart,* 784 F.2d 644 (5th Cir. 1990), *aff'd, Cowart v. Nicklos Drilling Co., supra.* Such is not the case.

In *Collier*, the claimant settled his third party case without the participation or consent of his employer. The employer was not a party to the case and this was important because it never gave the employer the opportunity to protect its right to set off. The Fifth Circuit held that Section 33(g) mandated that a LS-33 form be filed.

In *Cowart, supra,* the Claimant had received temporary total disability payments until he was released to return to work. Subsequently, without the written approval of the employer or its carrier, Cowart settled his third-party claim for a lump sum payment of $45,000. While the employer had notice of the settlement, it did not provide written approval, execute a written settlement agreement, participate in negotiations toward settlement, nor was it a party to the third party action. As a result, the Fifth Circuit held that the written approval requirement of 33(g) had been violated.

It is obvious that the factual pattern of *Cowart* has nothing to do with the factual pattern presently before this Court. In *Cowart,* the employer/insurer played no role whatsoever in the settlement negotiations between the Claimant and the third party defendant. The employer/insurer was not a party to the case and was not represented by personal counsel. Nothing could be further from the facts in the case at bar.

In both *Collier* and *Cowart, only* the employee settled with the third party. In the instant case, "the person entitled to compensation *and the employer"* settled with the third party. Therefore, Section 33(g) under these facts does not require the filing of the LS-33 form.

On the other hand, the case of *Williams v. Halter Marine Services, Inc., et al.,* 19 BRBS 248 (1987), is identical to the facts of the instant case and supports the Respondents' position. In

Williams, the carrier intervened in litigation which was prosecuted by the Claimant. During the course of the litigation, the case settled for $3,000.

The settlement agreement was not signed by the carrier. However, the carrier did join in a motion to dismiss the entire action based upon the settlement agreement. The issue before the Board was whether the filing requirements of Section 33(g) barred recovery.

The Board refused to bar future worker's compensation benefits holding that since the employer was a party to the case, Section 33(g) did not apply. The Court also recognized that *Collier*, relied upon by the Petitioner, was distinguishable on its facts and did not apply.

Similarly, in *Pinell v. Patterses Services*, 22 BRBS 61 (1989), the employer intervened in litigation and participated in settlement negotiations. It agreed to waive part of its lien and all parties settled the case simultaneously. However, the LS-33 form was never filed. The Board distinguished *Collier* and held that the participation in the case by the employer eliminated the need for the filing of the form.

There is simply no conflict among the Circuits on this issue and there is no reason for this Court to issue a writ of certiorari in this case.

II.

THIS COURT SHOULD REFUSE TO ISSUE A WRIT OF CERTIORARI ON THE ISSUE RELATING TO OFFSET UNDER SECTION 33(F) SINCE THE FOURTH CIRCUIT'S DECISION FOLLOWS THE NINTH CIRCUIT DECISION IN *FORCE*, THE ONLY APPELLATE COURT TO REACH THIS ISSUE.

Alternatively, I.T.O. argues that the Fourth Circuit erred in holding that claims for loss of consortium are not subject to offset. Here, it is clear that there is no conflict among the Circuits on this issue. In fact, the Fourth Circuit in the instant case based its holding on the Ninth Circuit decision in *Force v. Director, Office of Worker's Compensation Programs,* 938 F.2d 981 (9th Cir. 1991). With two appellate courts in accord and none in opposition, this issue is of little importance and certainly does not warrant the issuance of a writ of certiorari.

Initially, the Fourth Circuit held that unless the settlement agreement specifically apportioned liability between the Claimant and his family members, then the employer would be entitled to a total offset. Both the Fourth Circuit and the Petitioner were relying upon the decision of the Board in *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), which had held same. However, the Ninth Circuit reversed the Board's decision prompting the Director to file a Petition for Rehearing which was granted and the Fourth Circuit reversed this portion of its decision.

The Fourth Circuit properly concluded that "employers are not automatically entitled to a full offset whenever the settlement agreement at issue fails to address the issuance of apportionment." *Id.* Rather, the Administrative Law Judge should hear evidence on the issue of which portion of the settlement was entitled for loss of consortium and which portion was intended to give to the

Claimant. *Id.* There is evidence in this case to indicate that the money was for loss of consortium since the Release was signed by both Mr. and Mrs. Sellman. The burden of proof is on the employer as explained at great length by the Ninth Circuit in *Force*. This issue is not of sufficient importance to warrant an issuance of certiorari.

III.

THE FOURTH CIRCUIT PROPERLY FOLLOWED ITS OWN LOCAL RULES GOVERNING PETITIONS FOR REHEARING.

The Petitioner's arguments relating to due process are baseless. Petitioner's argument that the Director's Petition for Rehearing was untimely and in violation of the Fourth Circuit's local rules is simply incorrect. The government requested an extension of time to file same which was granted by the Fourth Circuit on February 3, 1992, twelve days after its decision. Local Rule 40.3 allows the government additional time to conduct a through analysis of the case when such a request is made within 14 days of the court's decision.

The Petitioner's attempt to distinguish between the Solicitor General's office and the Department of Labor makes no sense. If the Fourth Circuit only intended to allow the Solicitor General to ask for an extension of time to file a Petition for Rehearing and the Solicitor General only handles cases at the Supreme Court level, then such a narrow exception would obviously never be utilized. The real purpose of the section was to allow the government time to decide whether to file a Petition for Certiorari, a Petition for Rehearing, or to take no action at all. Certainly, the Fourth Circuit is the final arbiter of its own rules.

I.T.O.'s argument that it was denied due process because of

the Fourth Circuit's failure to allow it to respond to the Petition is without merit. As the Petitioner concedes, the Court has discretion to deny such a request. I.T.O. had already briefed the issue and the Court certainly knew its position on the issue. The sole purpose of the Petition was to bring to the Court's attention the decision of the Ninth Circuit in *Force* since the Fourth Circuit had relied upon the Board's decision below.

CONCLUSION

For the reasons stated above, certiorari should be denied in this case.

Respectfully submitted,

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